In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 304

CONTINENTAL ORE COMPANY, a partnership, et al.,

Petitioners,

vs.

UNION CARBIDE AND CARBON CORPORATION, et al.,

Respondents.

BRIEF OF RESPONDENTS UNION CARBIDE CORPORATION AND UNITED STATES VANADIUM CORPORATION

HERBERT W. CLARK,
RICHARD J. ARCHER,
GIRVAN PECK,
Crocker Building, San Francisco 4, California,
Attorneys for Respondents Union Carbide Corporation and United States Vanadium Corporation.

MORRISON, FOERSTER, HOLLOWAY,
SHUMAN & CLARK,
Of Counsel.

Moreover, it explained (*Id.* at 358):

> "The fundamental reason why persuading a sovereign power to do this or that cannot be a tort . . . is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. *It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law.*"

And it was immaterial that the allegedly unlawful conspiracy in *American Banana* had roots in this country, just as it is immaterial here that petitioners may claim Electromet of Canada was directed by Union Carbide in New York. As the Court said in *American Banana* (*Id.* at 359) and later repeated in *United States* v. *Sisal Sales Corporation*, 274 U. S. 268, 276 (1927):

> "A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law."

Petitioners do not cite *American Banana*. Needless to say, its authority continues where, as here, a plaintiff's claim for damages is based on "acts done outside the United States and not unlawful by the law of the place." *United States* v. *Sisal Sales Corporation*, 274 U. S. 268, 275-276 (1927). Still more recently this Court stated with respect to *American Banana*—"This Court agreed that a violation of American laws could not be grounded on a foreign nation's sovereign acts." *Steele* v. *Bulova Watch Co., Inc.*, 344 U. S. 280, 288 (1952).[34]

---

[34] Petitioners here rely on *Sisal* and other cases holding that Congress may in some circumstances control the conduct of Amer-

Thus established principles of comity and sovereign immunity, and the limitations on the extraterritorial application of the antitrust laws, require the conclusion that the Sherman Act did not apply and petitioners' evidence was properly excluded.

CONCLUSION

The judgment of the Court of Appeals was in all respects correct and should be affirmed.

We also submit that if this Court should find error on either of the first two questions discussed in this brief (*supra*, pp. 48-70), the proper relief is not the remand to the District Court for retrial which petitioners request (Pet. Br., p. 127). Rather the case should be remanded to the Court of Appeals for consideration of the errors

---

ican citizens beyond the territorial limits of the United States (Pet. Br., pp. 117-119).

No one disputes this rule. But in *Sisal* the Court had found the circumstances there "radically different" from those in *American Banana* (274 U. S. at 275). The distinction, this Court later repeated, is that in *Sisal* "the crux of the complaint" was "'not merely of something done by another government at the instigation of private parties;' . . . ." *Steele* v. *Bulova Watch Co., Inc.*, 344 U. S. 280, 288 (1952).

Nor does *United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F. 2d 199 (S. D. N. Y. 1929)—on which petitioners place so much reliance (Pet. Br., pp. 117-118)—make corporations liable for acts performed as agents of foreign governments. The corporation there, although partly owned by the French government, was engaged in a purely commercial venture of selling products in the United States (31 F. 2d at 200). This venture was "entirely divorced from any governmental function" and there is a "vast distinction" between a government serving a governmental function and one "seeking additional revenue in the American markets and causing a direct injury in the United States to our domestic commercial structure." *In re Investigation of World Arrangements, etc.*, 13 F. R. D. 280, 291 (D. D. C. 1952).

Subject Index

III

IV

V

VI

Table of Authorities Cited

Cases

Rules

Statutes

Texts

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 304

CONTINENTAL ORE COMPANY, a partnership, et al.,
Petitioners,
vs.
UNION CARBIDE AND CARBON CORPORATION, et al.,
Respondents.

BRIEF OF RESPONDENTS UNION CARBIDE CORPORATION AND UNITED STATES VANADIUM CORPORATION

OPINION BELOW

The opinion below is as stated in petitioners' brief.

JURISDICTION

The jurisdiction of this Court is as stated in petitioners' brief.

STATUTES INVOLVED

In addition to the provisions of the Sherman and Clayton Acts cited and quoted in petitioners' brief, the following are pertinent:

Act of May 24, 1949, Chapter 139, Section 110, 63 Stat. 105, 28 U.S.C. Sec. 2111:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Rule 61, Federal Rules of Civil Procedure:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

QUESTIONS PRESENTED

Each of the questions set forth in the writ of certiorari is taken word for word from the petition. In each, the wording has no substantial relationship to the evidence in the case or the proceedings below, and so entirely misstates the issues presented by the record.

The questions actually presented by paragraphs 2 and 6 of the writ of certiorari are in substance the same: whether the court below correctly affirmed the judgment entered upon a jury verdict upon the ground that plaintiffs wholly failed to prove any injury. This question requires solely a review of the evidence. No legal issue is presented.

Two questions are presented by paragraph 5 of the writ of certiorari. The first is the factual question whether there was any evidence that any respondent influenced the Government of Canada, or its agent, a subsidiary of one of the respondents, to decline to buy from petitioners, or that any respondent had anything to do with petitioners' asserted elimination from the Canadian market. The second is the legal question whether, assuming there was evidence of influence, as the court below assumed for the purposes of its opinion, such influence would be cognizable under the antitrust laws.

STATEMENT OF THE CASE

The Proceedings Below.

This action was begun on July 15, 1949 (R. 25). It followed and purported to rely on a criminal case against the same group of defendants filed on September 2, 1948,[1] entitled *United States v. Union Carbide and Carbon Corporation, et al.*, No. 11678, in the United States District Court for the District of Colorado. On June 4, 1957, how-

[1] An indictment against the same defendants was filed on June 1, 1946, and then dismissed on September 2, 1948, when the information was filed.

ever, the Government action was terminated, after a jury trial, by the acquittal of all defendants. No civil suit was brought by the Government at any time.

On June 2, 1958, the present case was brought to trial in the United States District Court for the Northern District of California (R. 110). The defendants in the trial court, respondents here, moved for a directed verdict "on the ground that upon the facts and the law the plaintiff has shown no right to relief" (R. 1989),[2] and the court reserved its ruling on the motion (R. 1989). Thereafter, the jury returned a verdict for the defendants (R. 2051) and the trial court noted its concurrence with such verdict (R. 2052). Judgment was entered upon the verdict (R. 104-05) and plaintiffs appealed (R. 105-06).

Upon appeal to the Court of Appeals for the Ninth Circuit, the "complete record and all of the proceedings and evidence in the above entitled action" were designated by petitioners. The parties designated for printing the entire transcript of testimony (See Appendix A hereto) and stipulated that all exhibits not printed could be considered on the appeal (R. 2057). Following the submission of briefs and oral argument, the Court requested supplemental "memoranda . . . pointing to every specific place in the record where there is testimony or documentary evidence which will show or tend to show" the cause of termination of each of petitioners' ventures in vanadium (Appendix B hereto) and such memoranda were furnished by both sides. Thereafter it entered judg-

[2]Respondents also filed a brief in support of the motion, stating the specific grounds therefor, which were in substance that there had been a total failure of proof as to each aspect of the case.

ment of affirmance on March 22, 1961 (R. 2583). Rehearing was denied on May 15, 1961 (R. 2584).

The Court in its opinion, written by Judge Magruder of the Court of Appeals for the First Circuit, considered all evidence offered, whether it was received or not. It assumed, without attempting to decide, that antitrust violations were shown, but concluded, in the light of the undisputed records and admissions, that petitioners' claims of injuries caused thereby were without basis in fact.

The Parties.

The petitioners in this Court, appellants below, are copartners doing business under the name of Continental Ore Company. The principal and directing partner is Henry J. Leir, the others being his wife and mother-in-law. The vice president of Continental was and is Martin Wolf. Continental is and has been engaged in the business of buying and selling a variety of ores and minerals.

The respondents, appellees below, are:

Union Carbide and Carbon Corporation (Carbide) which is now known as Union Carbide Corporation;

United States Vanadium Corporation (USV), a subsidiary of Carbide when the complaint was filed but now merged with Carbide, which owned mines and vanadium oxide mills; and

Vanadium Corporation of America (VCA) which has no connection with the first two respondents.

Three other subsidiaries of Union Carbide are also named in the complaint as defendants but were never served, and therefore are not respondents here. They are

Electro Metallurgical Company (Electromet or EM), a Carbide subsidiary until its dissolution on January 5, 1949, which made ferrovanadium from vanadium oxide; Electro Metallurgical Sales Corporation (Electromet Sales or EMS), a Carbide subsidiary until its merger with Carbide on March 14, 1949, which sold vanadium products; and Electro Metallurgical Company of Canada (Electromet of Canada), a Canadian corporation and a Carbide subsidiary, which sold ferrovanadium and vanadium oxide.

The Background of the Case.

A. The Vanadium Industry and the War.

The setting of the present case is the vanadium industry in the United States, from 1938, when the appellants took their first step toward entering the business, until 1949, when the lawsuit began. Some of the basic characteristics of the industry and of the wartime period are necessary to an understanding of the case.

Vanadium is found principally in ores, much of which also contain uranium. The ores are concentrated to form red oxide (red cake), then are fused into a black oxide known variously as vanadic acid, vanadium oxide, vanadium pentoxide, or V_2O_5, and then converted into ferrovanadium. This is the end product which is used to strengthen steel.

Vanadium-bearing ores themselves are plentiful. Petitioners' witness, Burwell, so testified (R. 139) as did respondents' witness, Hill (R. 1553). Leir himself conceded that anyone could go out on the Colorado Plateau, find the ore, mine it, and mill it (R. 1199).

Compared with other competing alloys, however, vanadium was and is expensive, and consequently its use has been for many years in a long-term declining trend. Burwell so testified (R. 146), and witnesses from Crucible Steel (R. 1682) and United States Steel (R. 1528) entirely agreed.

The downward drift of the industry was sharply interrupted by the advent of World War II in 1939. Vanadium, as an essential component for armor plate, tank parts, aircraft parts and other implements of war (R. 1526, 1528), experienced a strong upsurge in demand (Ex. 2, Vol. VIII R. 7, 8, 10, R. 113; Ex. 3, Vol. VIII R.11-17, R. 114).

At first, the new demand was principally from abroad. Traders, like the petitioner Leir, sold largely for export until July, 1940, when the embargo on exports took effect (R. 1233-34). The Union Carbide companies, then having a surplus of oxide and excess milling capacity (R. 1578), succeeded in selling most of it to Europe in the year 1939 (R. 148-49). VCA, at the request of the United States, sold 712,000 pounds of oxide to France, although it then had to balance its supplies by purchases from USV under the "Maggie C" contract (R. 1829-31).

Thereafter, as the United States involvement grew deeper, and the embargo took effect, the industry prepared directly for defense needs in the United States. "Uncle Sam needed the vanadium," as Burwell said (R. 160). In August, 1941, for example, the Government was asking VCA to increase its production from an annual rate of 2,700,000 pounds of vanadium to 4,000,000 pounds by the end of 1942 (Exhibit V-2-O; R. 1838-39, 1837). VCA re-

habilitated its idle plant at Naturita, Colorado, in 1939 and started operations there in 1940; by 1942 VCA had begun its operation of the plant built by the Government in Monticello, Utah; USV erected its new mill at Rifle, Colorado, in 1942 and continued the stepped-up operation of its mill at Uravan (Exhibit 6; R. 2069-71, 116; R. 1833).

The war brought in its train a set of sweeping controls. Vanadium was allocated by the War Production Board,[3] restricted by export and import controls,[4] and regulated as to price.[5]

More important in the context of the present case were the huge wartime programs for the acquisition and stockpiling of vanadium and uranium-bearing ores. Two subsidiaries of Union Carbide, as agents of the Government, assisted in the programs.

In early 1942, the respondent USV was appointed agent for Metals Reserve Company (MRC), a Government-owned corporation with authority to acquire ore for the United States (Exhibit U-B, R. 2358-63, 367; Exhibit U-D, R. 2369-81, 373). It proceeded to do so, paying such prices as were necessary. From the Government's point of view the MRC program was expensive, but successful: by the beginning of the year 1944, MRC had amassed a stockpile of about 1,500,000 pounds of vanadium contained in

---

[3]Exhibit U-5-O, R. 1363-67; Exhibit U-5-C, R. 985-86; 7 F.R. 4698; 7 F.R. 10934; 8 F.R. 17511, 10 F.R. 10429.

[4]Exhibit U-5-P, R. 1367-68; Exhibit V-2-P, R. 1865-68; General Imports Order M-63, December 28, 1941.

[5]Exhibit V-2-M, R. 1728, R. 2555-64; Exhibit U-5-D, R. 2462-66, 987.

V_2O_5, or about 3,000,000 pounds of oxide (Exhibit U-4-T, R. 2457, 968; Exhibit U-R, R. 2413, 437).

In early 1943, Union Mines Development Company, another subsidiary of Union Carbide, entered into a nonprofit contract with the United States Army (Manhattan District) to proceed "with the utmost secrecy and dispatch" to acquire "the strongest possible control" of the sources of uranium for the Government (Exhibit U-Q, R. 2397, 2403, 418). The result was that not only were large supplies of uranium acquired by the Manhattan District atomic bomb project, but vanadium as well. By September 30, 1944, the Army Engineers had built up a stockpile of vanadium oxide, as received from the Grand Junction mill, amounting to over 723,000 pounds, a supply which increased steadily until it reached about 1,600,000 pounds in February, 1946 (Exhibit U-5-T, R. 2485, 1985).

Thus, the Government programs resulted in a glut of vanadium by 1944 as the arms build-up tapered off and the end of the war approached. The program specifically designed to expand the supply of vanadium had succeeded and was terminated. The uranium program, which continued in operation, necessarily added more unwanted vanadium to the already bulging stockpiles.

B. The Petitioners' Ventures in Vanadium.

Continental's activities in vanadium closely coincide in time with the period of wartime demand and shortage. The first sales were in mid-1939. Volume rose rapidly in 1940 and 1941, quadrupled by 1942, then declined sharply in 1943, and dwindled to insignificance by 1944 and 1945. Sales after 1945 were negligible (Exhibit 119, R. 2212, 1090).

Continental's business as a whole was in a variety of metals and minerals, vanadium being a small part of its activities (R. 1083-86). It never made any permanent commitment to the vanadium industry. It built no plant or mill and the only permanent equipment it bought was a mixing container or "pebble mill" which cost less than $500 and was retained for only a few months (R. 1211-15). Continental had no regular employees with training or practical experience in metallurgy, in vanadium or otherwise (R. 910-11). Leir considered it "irrational" to stockpile vanadium in advance of proven demand (R. 1233) and preferred to let other companies associated with him make commitments to suppliers.[6] Thus the company maintained itself in an entirely flexible position, able to trade in whatever was in demand at any given time.

Continental's first and major venture in the vanadium business was with Apex Smelting Company, an aluminum processor. Leir, on behalf of a French associate, Brignoud, made a contract with Apex in July, 1938, providing that Apex would make ferro alloys, including vanadium. Leir was to procure the supplies and sell the finished product for Apex and share in the Apex profits. The technical knowledge was to come from Brignoud in France (Exhibit 117, R. 2187-2201, 1050; R. 1059, 1234). The processing was to be done at the Apex plant by Apex employees (R. 910) but Apex had never made ferrovanadium before (R. 800-01, 1060).

The Apex plant did not actually start production until mid-1940, two years after the contract was made (R. 1062,

---

[6]Discussed hereinafter, pages 30-37, 41-44.

1124, 1234, 1302). In the next two years, it produced about 100,000 pounds of ferrovanadium (Exhibit 119, R. 2212, 1090; R. 1351), much less than the planned capacity (R. 856, 1113). The project suffered technical setbacks and steadily lost money, and it diverted effort and time from Apex's essential aluminum business, and, for these reasons, Apex terminated the arrangement over the protests of Leir (Exhibit V-1-S, R. 1155, 1154; Exhibit V-2-A, R. 1176; Exhibit V-2-B, R. 1190-91, 2520-22, 1187; R. 1287, 1290-95).[7]

Continental's next major venture was in a product Leir called Van-Ex. Apex started to produce it for Continental; then, after Apex's termination in mid-1942, Continental produced it on its own for a few months. Almost all of the sales of Van-Ex were made in 1942 at the height of the shortage. They amounted in that year to $171,166.50, or about three-fourths of Continental's vanadium sales for the year (Exhibit 119, R. 2212, 1090).

Van-Ex was simply a repackaged vanadium oxide. The first shipment was made with an addition of a little fluorspar to conceal the composition (R. 1162) which was supposed to be "secret" (R. 842), but from then on, it was "just the plain ore" (Exhibit V-1-X, R. 1171-72; Exhibit V-1-C, R. 1007-11, 1282). The price of vanadium oxide was fixed at the time by the OPA (7 F.R. 3153; Exhibit V-2-M, R. 2555-64, 1728), but petitioners' vanadium oxide, repackaged and relabeled as Van-Ex, was sold about 20%

[7]The causes of the Apex termination are more fully set out hereinafter, pages 26-28.

higher than the OPA price (Exhibit 79, R. 2169-74, 797; R. 842, 909-10, 1161, 1172).[8]

Petitioners never sold any substantial amount of Van-Ex to American companies; they did, however, sell in quantity in 1942 to a Canadian company, Atlas Steels, Ltd. Such sales came to an end in early 1943 when the Canadian Government took over the purchasing and allocation for all the Canadian steel mills.[9]

In early 1943, Continental sought and found a new outlet for its supplies with Climax Molybdenum Company. It entered into a contract providing that Continental would ship Climax 20,000 pounds of vanadium which Climax would then convert to ferrovanadium for a fee (Exhibit 111, R. 1016-17, 1014). The contract was successfully completed, half of the materials for it being supplied by a Carbide subsidiary.[10] There is no evidence that either Continental or Climax requested or suggested a further contract.

Petitioners' final venture, with Imperial Paper & Color Corporation, never went beyond the planning stage. The agreement, made in January, 1944, was similar in substance to the Apex contract, but it contained a clause to the effect that the "contract" was contingent upon Imperial's decision whether actually to enter the field at all (Exhibit 110, R. 2175, 2178, 1014). Imperial never consummated the agreement and did not install the equip-

[8]The OPA interpreted the Act to forbid raising prices based upon a mere change of labels. Official Interpretations, 5-12-42, 5-23-42, Pike & Fischer, O.P.A. Service (1942) Vol. 1, page 11:1011, and see generally pp. 11:1012-28.

[9]Discussed in detail hereinafter pages 46-55, 75-77.

[10]Discussed hereinafter, pages 37-39.

ment for making ferrovanadium. Instead, it finally wrote Continental in December, 1944, that it did not wish to undertake the risks (Exhibit 114, R. 1022-23).[11] By that time, Continental was already, in substance, out of the vanadium business; it was refusing a flood of offers of supplies and otherwise in its contemporaneous letters exhibiting a lack of further interest in the material which had, by then, become plentiful.[12]

The Petitioners' Claims.

A. The Monopoly and Conspiracy Charges.

The complaint charges a conspiracy to commit various acts in violation of the antitrust laws. Most of the assertions, though denied, will not be discussed here because they are irrelevant to petitioners' claims of damage and were not dealt with by the court below. Two categories of glaring and repeated inaccuracy in petitioners' brief, however, must be met:

(1) No antitrust violations have ever been "confessed" or "admitted" by respondents, as petitioners repeatedly assert.[13] The accusations of Leir's friend, Burwell,[14] are

[11]Discussed hereinafter, pages 39-40.

[12]See pages 40-44.

[13]Petitioners even go so far as to misrepresent the opinion below, saying in their brief that the court of appeals "admitted" (page 68) and "conceded" (page 75) alleged antitrust violations. Of course, the lower court did not. It chose to decide the case on the causation issue "because defendants' strongest argument seems to us to apply here." (R. 2572.)

[14]Leir was a stockholder in Burwell's own "little" company (R. 519) and purchased a note of some $200,000 from the company at a discount (R. 541-42). Burwell also acknowledged that he was a competitor of the respondents (R. 516-18) and that he had had a series of policy disputes with his superiors while in the employ of USV (R. 158, 232-34, 289-90).

categorically denied here, as they were by witness after witness at the trial.[15]

(2) Petitioners in their brief list a number of "independent sources of supply" (pages 31-36) which they say were "eliminated by respondents" (page 31). They go so far as to assert that by 1945 "all of the vanadium oxide plants on the Colorado Plateau were controlled and operated by respondents" (page 63). The facts are that with the sole exception of the Durango mill, which plant USV did acquire in 1944, not a single one of the various mills mentioned in the brief (pages 31-36) was controlled and operated by respondents in 1945. The record shows the following:

Shattuck (North Continent Mines). In August, 1944, Union Mines, a Carbide subsidiary, bought North Continent for the Manhattan District at the direction of the United States Army (Exhibit U-2-F, R. 484-86) shortly after Continental declined the opportunity to buy it (R. 1205-08, Exhibit U-5-I, R. 1206).

Nisley & Wilson (Gateway Mill). After the termination of its toll agreement with the Government, the Nisley partnership sought to reopen its mill in 1944 but did not because Continental, its previous customer, refused to buy any of its output and it could find no other customers (R. 733-42). No respondent acquired it.

Blanding. The plant was allowed to revert to the Defense Plant Corporation in 1944 (R. 1728-29) after Con-

[15]Testimony of Remmers, R. 1368-1475; Priestley, R. 1475-1522; Hill, R. 1534-96; Holmes, R. 1596-1604, 1625-60; Emigh, R. 1604-25; DuTot, R. 1662-71; Colvin, R. 1672-91; Kett, R. 1806-22; Gibbons, R. 1822-60; Bransome, R. 1860-1964; Laub, R. 1964-84.

tinental declined to finance it or buy its existing supplies (R. 1713-26). No respondent acquired it.

Morrison-Ackermann (Loma Mill). The mill closed in 1941 as the result of technical difficulties and unsuitable equipment (R. 688-90, 1538-39). Thereafter Nisley bought some of its equipment (R. 644-45). Metals Reserve Company bought some of the stockpiled ore (R. 1538-39). No respondent acquired it.

Mesa. This was never a successful operation (R. 1539-40, 1544, 1597-98) and the plant and most of the equipment were abandoned for back taxes (R. 1599). USV acquired space at the mill for stockpiling (R. 1599, 1639) and certain claims on a royalty-payment basis (R. 1639-49) but never bought the mill (R. 1599-1600).

Mammoth-St. Anthony. USV negotiated to buy the production of this mill but did not do so. The production went first to Germany and then to another vanadium producer, Vitro Chemical Company (R. 177-78, 343). No respondent ever acquired the plant.

Anaconda Copper. Anaconda produced only red cake, which petitioners could not use and did not try to buy. USV bought the red cake from 1941 through 1946 but never acquired the plant or facilities (Exhibit 64, R. 2147-50, 591; R. 589, 621).

B. The Damage Claims.

Petitioners misrepresent the damage issue entirely when they assert as a fact in their brief that they were "eliminated" or "excluded" from the vanadium business, and say that the only issue is whether the "elimination" was

caused by respondents.[16] Respondents deny that there is any evidence in the record that petitioners were eliminated. In their view, all of the evidence is that petitioners were in and out of the business at will. The issues turn on whether they suffered any demonstrated injuries on the occasions when they were in the business.

As the lower court accurately stated in what respondents regard as the most significant passage in the opinion (R. 2573-74):

> "Appellants have complained of the loss of a few named, specific, business arrangements rather than a general loss inflicted by the defection of countless, individual customers. Direct evidence of causation was readily available to Continental, while in the case cited [Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946)] such direct evidence was practically impossible to come by."

Not only are the business relationships in this case specified; so is the cause of each alleged loss.

Petitioners' claims of injury, as alleged in the complaint and developed at the trial, fall into two categories:

> (1) A claim that petitioners could not secure enough supplies for their various ventures, allegedly because respondents refused to sell to them and interfered with their other sources of supply, and
>
> (2) A claim that respondents directly interfered with their business relationships with Apex and Climax and Atlas Steels.

---

[16]Petitioners also misrepresent the opinion below, saying that this "elimination" was "admitted" for the purposes of the opinion (*e.g.*, page 78). Of course this is untrue. The lower court concluded that there was no evidence at all of any elimination.

No other claims of damage were made in the complaint or sought to be proved at the trial.

Thus, the complaint specifies that the Apex contract failed "for the specific reason that it was unable to obtain vanadic acid" (Paragraph 33, R. 18). Van-Ex is claimed to have been discontinued "because [of] the difficulty of securing raw materials" (Paragraph 34, R. 18). The Imperial contract was allegedly abandoned "because of the inability of Imperial or Continental to secure vanadium oxide or vanadium-bearing ores" (Paragraph 35, R. 19).

Not only is it claimed in the complaint that in each of these arrangements appellants failed because of their inability to secure raw materials, it is also expressly denied that either the Apex or Imperial contracts failed for inability to make sales (Paragraph 35, R. 19):

> "Throughout this period of time, Continental had secured orders for all of the ferro-vanadium to be produced by Imperial and or Apex, but it was unable to fill the said orders because of the inability to secure ferro-vanadium for lack of the raw materials."

Such was the testimony at the trial. The attempted proof of damage, in fact, was all designed to show what would have been Continental's sales, based upon the hypothesis that it had had adequate sources of supply (R. 852, 856-57, 869-63, 1107-09, 1112-13).

The claims of interference are the second category. They are logically irrelevant if, in fact, petitioners were able to sell all they produced and were limited only by their supplies. Nevertheless, the claims were made and will be discussed.

The complaint does not specifically allege a direct interference with Apex, but, at the trial, petitioners sought unsuccessfully to show that VCA, which purchased some equipment from Apex after Continental had refused it and after the Apex contract was terminated, did so in order to cause injury.

The complaint does allege an interference with petitioners' Canadian business and a threat to Climax Molybdenum (Paragraphs 36, 37, 38, R. 19-21). Petitioners sought to prove both at trial by offering hearsay testimony that a non-officer employee of a Carbide subsidiary had threatened them.

For the first time on this review, the petitioners make the further claim in their brief (page 61) that respondents interfered with a plan of Leir's to build a vanadium mill. At the trial, there was no attempt to prove such interference, nor that Leir had any idea of building a mill.

The foregoing are the specific claims of injury. Each will be discussed in the remainder of this brief.

SUMMARY OF ARGUMENT

I

The overriding principle, determinative on this review, is that if the judgment of the trial court entered upon the jury verdict was right, it should stand. Similarly, if the affirmance by the court below was right, even if based in any part on the wrong reasons, it should in turn be upheld. Petitioners cannot be aggrieved if their proof shows that in fact they had no case.

II

Petitioners' specific claim of damage as to each of their ventures in vanadium is that they were unable to procure sufficient supplies and failed for that reason. Their own admissions and their own records elicited at the trial are exactly to the contrary.

During the course of the Apex contract, which lasted from mid-1938 to mid-1942, Continental and Apex continuously refused offered and available supplies amounting to many times the quantities actually used for the contract. In 1939, 1940 and 1941, they resold other supplies not needed for the business. The contract was terminated by Apex for reasons specified in its contemporaneous letters to the effect that Apex was losing money and valuable time, and there was no mention of any lack of supplies whatever. Instead, Apex complained that it could not use the supplies that Continental had procured. At the termination, Apex had on hand some 50,000 pounds of vanadium oxide.

Petitioners' business with the repackaged oxide they called Van-Ex began in 1942 and dwindled to insignificance in 1943. Leir wrote in January, 1943, that he had sufficient raw material and admitted on the witness stand that his supplies were then ample. During 1943, petitioners refused all of the output from one of their regular suppliers, amounting to 88,929 pounds of vanadium oxide, and thereafter refused numerous other offers.

Petitioners' only contract with Climax Molybdenum was in 1943. They in fact secured all their necessary supplies, one-half of the amount from a Union Carbide subsidiary, the other half from the Government agency which peti-

tioners claim was dominated by respondents. Neither Continental nor Climax showed any interest in a further contract.

In the period 1944 through 1949, petitioners had their tentative contract with Imperial. They declined to make use of their requirements contracts with respondents or otherwise to offer to buy. They refused to buy from their regular suppliers and from numerous new sources which offered them substantially unlimited quantities. They turned down a chance to buy outright the mine and mill of the biggest supplier they had.

Thus, petitioners obtained more than adequate supplies for each of their ventures, despite the wartime shortage. They were in the business only because of the shortage and left when it was over. The record is the diametrical opposite of their claim.

III

Petitioners claim other miscellaneous interferences not having to do with their supplies, but have no evidence of them.

The claimed interference with Apex was that VCA purchased some of the Apex equipment. The proof, however, was that Apex decided to dispose of it because Apex was going out of the vanadium business. The same equipment was offered to petitioners first, and they declined to purchase it.

The claimed interferences with petitioners' Canadian business and with their continued relationship with Climax both rest upon the same evidence. Petitioners offered to prove through Martin Wolf, Continental's Vice Presi-

dent, that he had a conversation with M. D. Arrouet, who was supposed to have told him that Continental should stay out of the vanadium business or else the Carbide companies would take reprisals affecting Continental and Climax. Arrouet was a non-titled employee of a Carbide subsidiary; there was no proof of his authority to speak for any respondent; and the conversation was plainly hearsay. Nor, if admitted, would it have tended to prove any injurious act; no evidence was offered that the asserted threat was adopted, approved, or acted upon by any respondent in any way.

Petitioners further suggest, for the first time on this review, that respondents interfered with their supposed plan to "build a mill." There is no evidence that they ever planned to build a mill, nor any explanation of what respondents are supposed to have done to interfere with any such plan, if they had had one.

Thus there was no evidence whatever of the claimed interferences, much less any showing of resulting injury.

IV

Not only did petitioners fail to show how any act of respondents could have injured them, they also failed to offer any evidence showing such injury in dollars and cents. They avoided the essential evidence altogether.

Petitioners never showed actual and existing demand for their vanadium. Instead they relied upon arbitrary estimates of market shares, not related to any evidence in the case. Petitioners never offered any evidence of what their net profits in vanadium, if any, actually were, or what they should have been. Instead they pointed to their

profits in other businesses, and to respondents' net profits in vanadium and uranium, and suggested arbitrary rates of net profit. Thus they invited the jury to guess that there would have been sales and guess that there would have been profits, and ignored the probative and material data which they alone could have furnished.

V

On these facts, the principles of *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946) are decisive in respondents' favor. The issue is not whether a plaintiff can use the best estimates of damage available, having shown acts which have a clear tendency to injure an otherwise profitable business. Here the issue is whether a plaintiff is permitted to recover when

(1) the specific claims of damages are disproved by its own records and admissions, or are the subject of no evidence at all, and

(2) it deliberately avoids the only figures and facts which could show whether a monetary injury actually occurred.

The *Bigelow* case itself requires that the verdict should be directed in such a case.

VI

The trial court and the court of appeals both regarded the evidence of petitioners' loss of sales in Canada as not cognizable under the antitrust laws. Respondents have already argued that the evidence was incompetent and nonprobative; they also contend that the lower courts were correct in the alternative ground they chose.

It is conceded that the Carbide subsidiary in Canada was appointed agent of the Canadian Government with the authority to purchase vanadium for the Canadian steel mills. Plainly, it was acting within the scope of its agency when it determined not to buy Continental's Van-Ex and ferrovanadium, and its decision, therefore, was that of the Government of Canada. Several principles, including the holdings in *Parker v. Brown*, 317 U.S. 341 (1943) and *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127 (1961) and the cases under the act of state doctrine, combine to the conclusion that such an act of a foreign government is not within the purview of the American statute.

ARGUMENT

I

IF THE JUDGMENT FOR RESPONDENTS IS CORRECT IN ITS RESULT, IT MUST BE AFFIRMED.

Basic to the present review is the rule, settled by this Court, that "if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302 U.S. 238, 245 (1937); *Brown v. Allen*, 344 U.S. 443, 459 (1953); 1 Wigmore, *Evidence*, pp. 369-70 (3d ed. 1940). An appellee may, without taking a cross-appeal, urge in support of the judgment any matter appearing in the record. *United States v. American Ry. Exp. Co.*, 265 U.S. 425, 435 (1924); *Langnes v. Green*, 282 U.S. 531, 538-39 (1931); *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957). The rule of these cases is codified in the harmless error statute,

28 U.S.C. Sec. 2111, and in Rule 61, F.R.C.P., both cited and relied upon by the court below.

The first respect in which this rule is directly applicable is that it governed, and here justifies, the ground of the Court of Appeals' decision.

In the Court of Appeals, the asserted errors of the trial court were hotly argued, respondents insisting that the trial had been in all respects fair and that the rulings on the evidence and the charge to the jury were correct.[17] The court below never passed upon these points, choosing instead to accept the alternative argument of appellees (respondents here) that the verdict could properly have been directed. For this reason, petitioners' request at the conclusion of their brief (page 127) that the action be remanded "to the District Court for retrial" is obviously incorrect; there has been no determination, as yet, that there was any infirmity in the trial which petitioners have already had and which resulted in a jury verdict against them.

What the court below did was to determine that no error, if found, could affect the judgment because the plaintiffs had, in any event, failed to prove their case. This was a course clearly open to any court of appeals. It has been repeatedly held that where a defendant is entitled to a directed verdict, errors in the charge to the jury,

[17]In this regard, the Court is invited to peruse the jury instructions as given (R. 2014-38). The asserted errors of all kinds are immaterial on this review, and cannot be discussed in the present brief. It is enough to say that Appendix A in petitioners' brief gives a totally distorted picture of the trial, and that each of the rulings complained of can only be fairly reviewed by an unhurried examination after briefing and argument.

West v. Camden, 135 U.S. 507 (1890); *United States v. J. E. Bohannon Co.*, 232 F. 2d 756, 757-58 (6th Cir. 1956); *Wonnacott v. Denver & Rio Grande Western R. Co.*, 187 F. 2d 607, 608 (10th Cir. 1951); *Weidenfeld v. Pacific Imp. Co.*, 43 F. 2d 817, 820 (2d Cir.), *cert. denied*, 282 U.S. 890 (1930); or in the exclusion of evidence, *Mecker v. Lehigh Valley R.R.*, 236 U.S. 434 (1915); *Syres v. Oil Workers International Union*, 257 F. 2d 479, 484 (5th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959); *Baird v. Aluminum Seal Company*, 250 F.2d 595, 601 (3d Cir. 1957; or both, *Monolith Portland Midwest Co. v. Western Pub. Serv. Co.*, 142 F.2d 857, 859-60 (10th Cir. 1944); *Nalbantian v. United States*, 54 F.2d 63, 64 (7th Cir. 1931), *cert. denied*, 285 U.S. 536 (1932), are an insufficient ground for reversal upon appeal. In none of these cases did the winner of the jury verdict move for judgment notwithstanding the verdict or cross-appeal. In fact, a fully successful party has no right to appeal. *Lindheimer v. Illinois Bell Tel. Co.*, 292 U.S. 151 (1934); *Public Serv. Comm. v. Brashear Freight Lines*, 306 U.S. 204 (1939).

The other respect in which the principle is here important is that this Court, in turn, is not bound by the reasoning of the court below. The respondents propose to argue hereinafter that the Court of Appeals was right for a number of factual and legal reasons in addition to those specifically mentioned in its opinion. The lower court, for example, does not reach the point of discussing petitioners' totally inadequate showing of loss of sales and profits. That will be urged hereinafter as an independent ground for affirmance. The lower court does not reach the question of the competency and sufficiency of

the evidence relating to Canada but, instead, decides that the evidence is not cognizable as a matter of law. Respondents will discuss both points. All of these matters, being encompassed by the language of the writ of certiorari, are properly before this Court.

Directly in point on this aspect of the review is one of the cases on which petitioners particularly rely. In *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555 (1931), this Court held that it should consider upon the merits respondents' additional ground for sustaining the judgment below, which was that there was no evidence of an anti-trust violation. Petitioners insisted that such ground was not open for consideration because there was no cross-petition for certiorari, but this Court disagreed, saying (282 U.S. at 560) "respondents do not invoke that ground in order to overthrow the judgment below, but to sustain it; and this they may do."

II

THE PETITIONERS' ADMISSIONS AT TRIAL AND THEIR CONTEMPORANEOUS RECORDS SHOW CONCLUSIVELY THAT THEY HAD ADEQUATE SUPPLIES FOR EACH OF THEIR VENTURES AND TERMINATED SUCH VENTURES FOR OTHER REASONS.

The Apex Contract Was Terminated for Reasons Not Related to the Case.

Continental's contract with the Apex Smelting Company, which lasted from July, 1938, to July, 1942, was terminated by Apex. The reasons are spelled out in detail in Apex's letters at the time and corroborated by

the testimony of Bayer, an Apex officer called by respondents. Petitioners called no witness at all from Apex.

It was undisputed that Apex throughout had trouble with the aluminum thermic process favored by Leir. It required aluminum of high purity which was difficult to get in 1941 and 1942 (R. 873, 1217-18, 1280-81). As Leir summarized it in his letter of February 16, 1942 (Exhibit V-2-A, R. 1179, 1176):

> "A good part of our losses resulted from the use of aluminum-tin foil scrap."

Recoveries were far below those expected. Apex wrote in June, 1942 (Exhibit V-2-B, R. 1189, 1187). As Bayer put it, Apex had to learn "by our own experiments" (R. 1349-50). Apex had additional major difficulties with vanadium fumes and dust which, as they wrote Leir, had injured their employees (Exhibit V-2-G, R. 2528, 1291):

> ". . . our men are now organizing and the men that we have had in the Ferro Department refuse to go back into it as they claim that it is injurious to their health."

As a last straw, Apex, in October, 1941, suffered a serious fire in its ferro alloy department which prevented all operations for at least a month (Exhibit V-1-S, R. 1154-57).

A major and additional reason for Apex's difficulties was that it had invested only $30,000 or $40,000 in the alloy project (R. 1346) while Continental invested nothing at all (R. 1211-14). This amount Apex conceded to have been "greatly inadequate for a sound and efficient business" (Exhibit V-2-C, R. 2523, 1194) and Leir more than agreed. He wrote in February, 1942, that Apex had "never

had the necessary equipment" and concluded (Exhibit V-2-A, R. 1179, 1182, 1176):

> "It is not our fault that you treated the Ferro department as a stepchild from the very beginning."

At the trial Leir was asked if that letter constituted "a very fair statement of the situation," and he replied, "I consider it as an excellent letter" (R. 1185).

By late 1941, Apex was ready to abandon the stepchild altogether. Its hands were full with its regular business of remelting aluminum which it felt was "so vital a part of the defense program" and upon which it wished to "concentrate all of our efforts and available space" (Exhibit V-1-S, R. 1154-55). Leir explicitly recognized this at the time (Exhibit V-2-A, R. 1176):

> "It appears that the main reason for your wanting to get rid of the ferro business is your need for space for other essential war production."

The final and decisive fact was that the Apex ferro alloy department had steadily lost money. Leir made his gross selling commissions, while Apex lost about $8,000. In the end, Apex elected to terminate the contract on that specific ground (Exhibit V-2-B, R. 1190-91, 2520-22, 1187; R. 1295, 1347-48).

These were the specific reasons given for the termination in the contemporaneous correspondence of Leir and Apex relating to that termination. Throughout these letters there is not a word about any inadequacy of supplies.

Continental Had Adequate Supplies Throughout the Apex Period.

For the limited production actually undertaken by Apex, supplies were more than adequate throughout the contract

period, despite a growing and general vanadium shortage. The opinion below emphasizes the failures of Continental to request vanadium oxide from respondents, particularly during the last year of the venture (R. 2576) and also notes their failures to buy other available supplies.[18] Both aspects of the evidence are significant, and will be discussed below.

In 1939, Continental's first full year in business, EMS, a Carbide subsidiary, sold it approximately half its supplies (R. 1228-33, Exhibit U-5-L, Vol. IX, R. 588-90, R. 1229; Exhibit 119, R. 2212, 1090; Exhibit 120, R. 2213, 1094).[19] Continental requested no more oxide from the Carbide companies during the entire life of the Apex contract other than on one occasion in June, 1941; Electromet declined that offer because it needed the material (Exhibit 77, R. 776-78).[20]

VCA, in 1939, offered to sell to Continental for export, but this offer Continental itself refused, although it was exporting at the time (R. 1966-67; Exhibit 132, R. 2258, 1245). VCA declined two offers from Continental, later in

---

[18]R. 2575: "If such a shortage did exist, it is hard to understand why Apex turned down proffered arrangements with the Blanding mine or with Morrison, both of which could have furnished Apex a considerable quantity of oxide."

[19]The material was purchased through one Poliakoff, but the books indicated that Continental paid EMS directly (R. 1228). Leir gave his opinion that he could not have gotten the material directly (R. 1228) which petitioners stress in their brief (page 104), but there is no evidence that he tried to do so, or that EMS refused to sell to him at the time, or that the intercession of Poliakoff made any difference.

[20]Continental made no request in October, 1940, as stated in petitioners' table in their brief (page 59) but rather Apex wrote to say it understood from an EMS salesman that EMS was taking no new accounts (Exhibit 128, Vol. VIII, R. 189-90, R. 1240).

1939 and 1940 (Exhibit 132, R. 2260, 1245; Exhibit 63, R. 779-80), because their own supply position was becoming acute, as their contemporaneous letters show (Exhibit 56, R. 1956-57, 326; Exhibit 166, R. 1899-1900, 1970). Continental made no further requests to buy from VCA during the life of the Apex contract.

Thus at the beginning, Continental met with no refusals but rather with a sale and an offer to sell from VCA and the Carbide companies. Thereafter, those companies were using their vanadium oxide themselves, as Wolf conceded at the trial (R. 870):

> "The Court: And they did use the vanadium oxide in the manufacture of the ferro-vanadium for steel.
> The Witness: That is correct; that they used themselves."

Whether respondents could have furnished further supplies in the later stages of the Apex contract is doubtful; they were then reporting to the OPM that they had no excess supplies (Exhibit 132, R. 2265, 1245). But in any event Continental and Apex, as the court below pointed out, never asked them.

The reason was that the other supplies for the Apex contract were more than adequate.

Throughout the contract period, Apex had a regular and adequate supplier in the Shattuck Chemical Company (North Continent Mines) which Burwell testified "had far more ore than the Vanadium Corporation [V.C.A.] did" (R. 509). There is nothing in the record to show that Shattuck was unwilling to mill it and sell it, and in fact Leir so suggested to Apex in December, 1941 (Exhibit 127, R. 2222, 1240):

> "Regarding Shattuck, we suggest that you approach them and offer them a contract for larger monthly quantities than they have at present from you, in order to induce them to increase their output."

Apex, as discussed hereinafter, did not believe in large contracts and feared an oversupply, and so declined the suggestion. Even as it was, Shattuck supplied the bulk of Apex's oxide (Exhibit 118, R. 2210, 1066-68), and this supply continued uninterrupted.

And there were many other sources.

At the inception of the contract, there was, of course, no immediate need for supplies, since the Apex Thermit Department was not prepared to operate. Leir agreed in his testimony that he could have stockpiled supplies of vanadium oxide for use in connection with the Apex contract, but he thought it would have been "irrational" to do it (R. 1233). Thus, from July, 1938 to July, 1940, when the embargo on exports took effect, Leir simply exported the bulk of the vanadium he purchased (R. 1233-34).

Even for its export sales Continental had adequate supplies. In July, 1939, it canceled an order with Vitro Manufacturing Company for 6,000 pounds of oxide because of a $60 or $70 expense item and arranged to buy it elsewhere despite Vitro's objections (Exhibit U-5-K, R. 2474-84, 1219). Leir did not recall that he ever purchased from Vitro thereafter (R. 1222), although Vitro was one of the big producers (Exhibit 34, R. 199-201, 198).

Even after Apex had started production, Leir continued to sell available supplies to persons other than Apex. Between September 1940 and December 31, 1940, Con-

tinental sold 28,000 pounds of vanadium oxide to other customers, and in early 1941 made one additional sale of 1,858 pounds (Exhibit U-5-N, Vol. IX, R. 591; 1236-37). Leir testified that he "was not concerned at that time about getting regular supplies from others" (R. 1237).

Specifically, Leir did not expect Apex to reach full production until January 1941, and he predicted he would have 20,000 pounds of vanadium oxide per month from Blanding and the same from Rifle, as well as further amounts from other sources. Accordingly, he arranged to resell the first 20,000 pounds received from Blanding in August 1940 (Exhibit V-1-J, R. 2499, 1127; R. 1127-31). He testified that he was reluctant to buy oxide for the Apex operation until the installation was ready (R. 1138).

Apex had a definite policy at the time of not stockpiling supplies or committing itself in advance to take them. As Bayer put it, "We never enter into any long term contracts" (R. 1353). So far as vanadium was concerned Apex was not interested even in maintaining a one month supply of oxide on hand; whatever brief periods Apex may have had with a low inventory were directly attributable to this policy (R. 1276-77).

Apex flatly refused on four separate occasions to make agreements which would have secured for it much greater supplies of oxide on a regular and sustained basis. Thus:

(1) Blanding Mines wrote to Continental in the fall of 1940 that it could expand its capacity to 25,000 to 35,000 pounds per month but it needed $20,000 in capital together with an assurance of a long term contract (Exhibit V-2-I, R. 1698-99). Blanding's output at the time was already 12,000 to 15,000 pounds per month (Exhibit

131, R. 2233, 1242) about as much as Shattuck's (R. 1208) and Apex was only buying about half that much (Exhibit 118, R. 2209, 1066). Thus, when Leir suggested that Apex and Continental furnish $10,000 for the expansion, $7,500 of this amount to be put up by Apex (R. 1153), Apex characteristically refused. Leir accordingly had to reply to Blanding that the associates "cannot consider participating in the financing of your mill" and that they could only offer a three months output contract (Exhibit V-2-I, R. 1699-1700, 1698). Three months was not what Blanding had in mind, according to Hayward Bigler, President of Blanding at the time, and, there being no assurance of either financing or assured sales, Blanding did not expand and Apex did not acquire the expanded source of supply (R. 1700).

(2) In December, 1940, the Morrison mill, later purchased by Ackermann, was willing to make a contract with Apex for definite future quantities of vanadium oxide and Leir immediately urged Apex to bind itself to do so. Leir estimated that the mill had an available production of 15,000 to 18,000 pounds per month (Exhibit V-1-K, R. 2501, 1133). Apex, however, declined, stating that it wished to match its purchases to its projected sales (Exhibit V-1-O, R. 1140-2).

(3) In the spring of 1941 when Ackermann took over the Morrison mill (R. 1142) he wanted, in particular, an assured customer for his products. Leir again suggested that Apex contract to buy through Continental "Ackermann's output up to, let us say, 15,000 pounds a month" (Exhibit V-1-P, R. 1143, 1142) but Apex felt the matter required a "lot of thought" (Exhibit V-1-P, R. 1144,

1142). Leir does not recall that any such contract was made or guaranteed by Apex (R. 1144-45) and there is nothing in the record to the effect that it was.

(4) In September, 1941, as Pearl Harbor approached, a really large supply of vanadium oxide became available to Apex and Continental. National Vanadium Company offered them an output contract on its entire projected output of 80,000 pounds of oxide a month if Apex would agree to stockpile the material on a two-month anticipation basis (Exhibit V-1-Q, R. 2507-09, 1145). Leir urged Apex to make such a contract (R. 2509-10), but Apex refused to enter into any output contract or any other agreement which was not related to its actual sales (R. 1150). It wrote in part (Exhibit V-1-Q, R. 2512, 1145):

> "• • • we come to the conclusion that we have so frequently expressed to you, and that is to keep ourselves from becoming involved in anything outside of our own operations.
>
> • • • we feel it is entirely too dangerous to tie up for a five-year contract, in fact for any length of time. We would be glad to give them a contract based on the market for Ferro Vanadium and for a per cent of our production."

In the end the most Apex would offer was a preference to the extent of 70 per cent of its requirements. "This is all we could obtain" wrote Leir to National Vanadium (Exhibit V-1-R, R. 2514, 1151). He offered, however, to market National's "surplus" vanadium (R. 2514) and he sought to assure the company that Apex could in the end handle it all (R. 2515):

> "P.S.—You will have noted from your discussion with Apex; that they are very conservative. It is

our personal opinion that the consumption of Ferro Vanadium will go up so very much that eventually every pound of your production will go to Apex. However, *you will appreciate their attitude to their present suppliers.*" (Emphasis added).

Thus no contract was ever made.

Apex actually complained of an oversupply to Leir in its letter of October 25, 1941 (Exhibit V-1-S, R. 1155-57), saying that Shattuck had been shipping 12,000 to 18,000 pounds of oxide a month to them for some months (R. 1157); that they had sufficient oxide to cover existing orders; that they had arriving an additional supply from the Nisley and Wilson mill at Gateway (R. 1156); and that they did not wish to continue the contract (R. 1155-57). The letter concluded (R. 1157):

> "We also believe that we should immediately notify all our shippers of raw materials to discontinue making shipments to us until further notice."

Leir, who was by this time interested in the possibilities of Van-Ex, telephoned Apex immediately to prevent the discontinuance. On October 27 he wrote a letter of confirmation (Exhibit 129, R. 2223, 1240):

> "As arranged, you will *not* notify the various suppliers of raw materials to stop shipments, especially since all the raw material received can be easily disposed of under present circumstances."

That is, he thought, he could find a market for the excess supplies, whether they were needed for the Apex contract or not. Leir prevailed, with the result that by the end of 1941, Apex had 45,827 pounds of vanadium oxide on hand (R. 1306).

From the end of 1941 on, Apex was attempting to terminate the contract, and it bought as little as possible. Leir wrote Apex in January, urging it to buy more from Shattuck, to offer to buy from Monticello, and to speed up deliveries from Nisley and Wilson (Exhibit 127, R. 2222, 1240). Apex did none of these things; in fact, it was unable to accept some 12,000 pounds of oxide from Nisley and Wilson which they had ready for shipment. As Frank Nisley, a witness for the plaintiffs, testified (R. 669):

> "We had been shipping to Apex Smelting Company, and I believe they had a fire in their plant and were unable to take the product at that time * * *."

On February 14, 1942, Apex notified its suppliers, including Shattuck, to stop their shipments (R. 1283-84, Exhibit V-2-E, R. 1284). Apex then had on hand 50,000 pounds of vanadium oxide (R. 1331, 1342). Leir testified that he could not remember whether shipments were in fact immediately stopped, *but he admitted that supplies were available at the time* (R. 1175):

> "Q. Why, I am sure you didn't approve of it, but did they not at that time notify the shippers, Apex notify the shippers to stop shipping their ore?
>
> A. I couldn't tell you this.
>
> Q. You don't remember that?
>
> A. No.
>
> The Court: At that time, now Apex was able to get ore?
>
> A. Yes."

When in March Apex finally agreed to a temporary continuance of the contract it again warned Leir of the dangers of an oversupply. Leir had demanded that Apex

agree to convert, through May, all of the oxide he could secure from Blanding, Nisley and Wilson, and Shattuck (Exhibit 122, R. 2217, 1096):

> "Not knowing how those quantities may be increased, it is difficult for us to make a commitment with the limited capacity that we have."

Bayer, the only Apex witness, had no difficulty in answering the ultimate question. His testimony is clear-cut (R. 1287):

> "Q. Well, were you influenced in closing your ferro-vanadium business by the fact that you could not secure vanadium oxide?
>
> A. No, that wasn't the reason for closing."

The reasons, as he testified, were those specified in the contemporaneous correspondence (R. 1290, 1361-62), and they had nothing to do with any shortage of supplies, and nothing to do with respondents.

Continental Had Adequate Supplies for Its Van-Ex and Climax Ventures.

Continental produced Van-Ex in the latter part of 1942 and the early part of 1943. It was in February, 1943, that it made its contract with Climax Molybdenum Company for the conversion of a stated amount of vanadium oxide (Exhibit 111, R. 1016-17, 1101-04). There is no evidence that either Continental or Climax requested or suggested a further or additional contract. Thus the issue in both cases is whether, in the year 1943, petitioners had inadequate supplies for their existing purposes.

Leir's admissions alone are conclusive. He wrote in January, 1943, that he had "sufficient raw material"

(Exhibit V-2-C, R. 1194). When asked about this on the witness stand, he testified as follows (R. 1196):

> "Q. Well now, Mr. Leir, then in January of 1943 you had assurance of ample supplies of vanadic acid, is that correct?
>
> A. Yes."

The uncontradicted facts show he was right. Nisley's Government-subsidized plant produced 88,929 pounds of vanadium oxide in 1943, all of which was available to Continental, but Continental bought none of it (R. 1610, 663). It canceled one order in July, ostensibly because it was not in the form of flakes (Exhibit U-3-Z, R. 931-32), although it had previously accepted oxide in the same form from another mill (R. 1612), and although MRC was urging Continental to buy it (Exhibit U-3-Y, R. 929, 928). Then in October, when the Nisley oxide was in flakes and "just what we like best," and available in a quantity of 11,000 to 12,000 pounds a month, Continental still declined to buy (Exhibit U-5-J, R. 2471-73, 1209).

Continental needed little or none of Nisley's supply for the 20,000 pounds of vanadium converted under the Climax contract. It was EMS, the Carbide subsidiary, that supplied half the oxide needed for the Climax contract (Exhibit U-4-D, R. 942; Exhibit U-4-E, R. 943-44).[21] More was supplied by the Durango mill of Metals Reserve Company (R. 924). Thus the only time Continental applied to MRC for oxide, it got it: the *only* evidence is that all of the MRC-controlled supply was available to Continental, as to anyone else.

---

[21] This fact is omitted entirely from petitioners' table in its brief (page 59).

Thus when in 1943, Continental made its requests for monthly contracts to VCA and EMS, which they declined on grounds of short supply and prior commitments (Exhibit 40, R. 271, 269; Exhibit 41, R. 271-72, 270; Exhibit 42, R. 272-73, 271, R. 1969; Exhibit U-5-Q, R. 1371-72), Continental was already refusing regular and substantial supplies available to it from its regular supplier, Nisley, and declining to make any other requests to MRC, despite its demonstrated willingness to sell.

Continental Had Adequate Supplies for Its Imperial Contract.

Continental entered into its contract with Imperial Paper & Color Corporation in January, 1944 (Exhibit 110, R. 2175-78, 101-04). Under the arrangement Imperial reserved the decision whether or not actually to proceed, and it never did.

Imperial's decision was made known in December of 1944 (Exhibit 114, R. 1022):

> "• • • with the manpower situation as it is, we could not proceed with the Vanadium project, aside from all other considerations, • • •"

The letter continued (R. 1023):

> "As we see this situation at the present time, one of the principal hazards in entering into the manufacture of V_2O_5 is the *possibility* that you may not be able to get sufficient raw material. Certainly the two major producers at this time have protected themselves against such a *contingency* by controlling primary sources of raw material. *We would not be willing at the outset at least to make an investment of the size necessary to do this*, but nevertheless we must be sure that there are sources from which we can

always obtain vanadium-bearing materials *at a price which will enable us to manufacture and compete with those who control their own supplies.*" (Emphasis added.)

In short, there were two reasons for the failure to consummate the contract from Imperial's point of view: (1) The wartime shortage of manpower, and (2) Imperial's opinion that over the long run it was necessary to have an integrated business to compete successfully. The manpower shortage temporarily was beyond the control of the parties. Acquisition of primary sources of ore and of mills, however, was not. They were fully available, but neither party wished to put up the capital.

The "primary sources of raw material" which Imperial mentioned were there for the taking in mid-1944, and Continental failed to buy. The entire assets of North Continent Mines, which Burwell described as having "far more ore than the Vanadium Corporation did" (R. 509), were up for sale from before the inception of the Imperial contract until August, 1944. Leir had written to North Continent inquiring about its future plans in November, 1943, had gone to Chicago to see its principal officer in February, 1944, and had actually proposed a possible purchase in June, 1944 (Exhibit U-5-I, R. 1205-07), but Continental never in fact made an offer (R. 1207-08). Whether Leir ever told Imperial that North Continent could be purchased outright does not appear in the record.

It was after Leir passed up this opportunity that in August, 1944, Union Mines bought North Continent Mines for the Manhattan Project at the direction of the United States Army (Exhibit U-2-F, R. 484-86).

Leir, in fact, fully conceded at the trial that anyone who wished to commit himself could buy primary sources of raw material at any time (R. 1199):

> "Q. From your investigation of the Colorado Plateau, wouldn't you say it is true that anyone who had sufficient financial resources could have acquired sufficient vanadium ore-bearing bodies and constructed a vanadium plant so as to produce oxide, provided he was sure of a market?
>
> A. Yes, definitely."

But Continental chose not to acquire primary sources of supply, as Imperial was aware.

There was also a vast quantity of ore still in the ground near the Nisley and Wilson mill at Gateway. Burwell in 1941 had estimated the ore reserves "immediately tributary" to Gateway as containing 5,900,000 pounds of oxide (R. 596), and he testified that in later years "there has been about $20,000,000 worth of vanadium-uranium taken out of that area" (R. 291). In 1944, the bulk of this ore was necessarily still there.

Three hundred thousand pounds of it had already been mined and stockpiled by MRC and now was available for milling and sale. Nisley, who was being called into the Navy in the spring of 1944 (Exhibit 76, R. 762-63; Exhibit U-2-Y, R. 736-37) tried to interest Leir in buying the finished oxide. On April 4, 1944, he telegraphed (Exhibit U-2-V, R. 733):

> "Refer our letter March 24 concerning outlet for 300,000 pounds vanadium at rate 600 pounds per day. If you cannot handle above amount at present please wire us amount you could handle."

Leir could only reply "We will give you all possible cooperation * * *" (Exhibit U-2-W, R. 733) and "* * * we cannot give you a definite answer today * * *" (Exhibit U-2-X, R. 735-36).

In July, 1944, Nisley's two partners each wrote Leir again offering the production of the mill, estimated at 15,000 pounds per month (Exhibit U-3-B, R. 741; Exhibit U-2-Z, R. 738) but Leir only replied, "* * * we will keep it in mind should an opportunity present itself" (Exhibit U-3-A, R. 739).

Blanding also had available an output of 15,000 pounds a month which it wished to expand to 50,000 per month. In March, 1944, Continental was asked for financial assistance for the expansion but it declined (Exhibit V-2-K, R. 2533-53, 1715), offering instead only to take such output "as the same shall or may be specified for delivery from time to time" (R. 2538) and offering substantially less than the market price (R. 1722). Leir wrote at the time (Exhibit V-2-K, R. 2552, 1715):

> " * * * frankly speaking, we are not in need of any material from Utah Colorado today, unless we should want to expand our present business considerably."

For the next two months the mill stayed open anyway and produced about 12,000 pounds of oxide, but Continental refused to buy it (R. 1726). In the latter part of 1944 the mill was allowed to revert to the Defense Plant Corporation (R. 1728-29).

These supplies were minor, however, compared to the huge MRC stockpile, about 2,500,000 pounds of oxide (Exhibit U-4-T, R. 969-70) of which the Nisley mill's pro-

duction (offered to Continental and refused) formed a small part. MRC had it available for Continental's purchase "all in the form of flakes" and in any "given quantity" (Exhibit U-4-R, R. 964). There is nothing in the record to show that Continental bought any of it except for one shipment of 4,353 pounds (Exhibit U-4-R, R. 964-65).[22]

Throughout the period of the Imperial contract supplies were available from appellees as well, but Continental bought very little.

It purchased a small amount of oxide from EMS in May, 1945 (Exhibit U-4-V, R. 974-5; Exhibit U-4-W, R. 976). From the beginning of 1946 onward, Continental had requirements contracts from EMS for unlimited amounts (Exhibit U-4-X, R. 2459, 977; Exhibit U-4-Y, R. 981-82; Exhibit U-4-Z, R. 982-83; Exhibit U-5-A, R. 983; Exhibit U-5-B, R. 984; Exhibit U-5-H, R. 2469, 997), but its actual purchases were nominal.[23]

Continental made no offers to buy from VCA in 1944, or in 1945, or in 1946. In February, 1947, VCA offered to sell a carload of oxide a month to Continental at its regular contract price of $1.10, but Continental advised that "our buyers" would not buy at more than $1.00 to $1.05 (Exhibit 78, R. 781-83). There is no evidence that

---

[22]Imperial also turned down huge foreign supplies of vanadium, although Continental professed to be interested (Exhibits U-3-F through U-3-O, R. 879-903, 1204-05).

[23]Petitioners make the point in their brief (page 63) that the contracts were for "domestic" manufacturing requirements, but they failed to buy for domestic use, and in fact bought a small amount for export (Exhibit U-5-E, R. 2467; Exhibit U-5-F, R. 2468, Exhibit U-5-G, Vol. IX, R. 585, R. 991-98).

Continental ever met VCA's regular price at the time or thereafter, or made any further overtures to VCA.

Faced with the plain evidence that Continental and Imperial refused supplies from the respondents, apparently available in adequate and steady quantities, Wolf could only testify that refusals to sell were not his complaint after all (R. 979-80).

> "Q. (By Mr. Archer): Mr. Wolf, haven't you just testified that one of your complaints here is that up to 1949 the defendants had refused to sell you vanadium oxide?
>
> A. The defendants have not—no, have not refused."

In short, at the trial the claim of "elimination" collapsed in the face of petitioners' own records. Petitioners left the business when supplies of all kinds were in vast abundance. There was ore in the ground, ore already mined and oxide already milled, all glutting the market. Continental could have flooded Imperial with supplies, could have invested as much as it chose in primary or secondary sources of raw material. It chose to do none of these things.

III

THERE WAS NO EVIDENCE OF THE CLAIMED INTERFERENCE WITH PETITIONERS' BUSINESS RELATIONS.

There Was No Evidence of Any Interference With Apex.

The claim that respondents interfered with petitioners' relationships with Apex is based solely on VCA memoranda, and these give no support to the claim. The only other evidence was from the VCA witnesses and from

Bayer of Apex, and that testimony was all to the effect that there was no interference.

Petitioners introduced correspondence and memoranda of VCA in February, 1942, showing that after Apex had quit the business VCA had been approached by Apex to buy the equipment of the ferro alloy department and that VCA was considering it (Exhibit 62, Vol. VIII, R. 163-69; R. 671-76, 1331-35). VCA knew nothing about the available equipment, however, prior to Apex's final decision in January to go out of the business (R. 1283, 1285), and there is no evidence whatever to show that VCA initiated the discussions. Apex offered its entire equipment to Continental that spring, but Continental refused to buy it (Exhibit 122, R. 2215-16, 2221, 1096; Exhibit V-2-F, R. 1288-90, 1337-38). Thereafter, Apex again offered it to VCA (Exhibit 130, R. 2225-28, 1241; Exhibit V-2-H, R. 2530-32, R. 1359-60). VCA finally bought one item, the magnesite used for the Apex crucibles (R. 1286-87, 1325), and refused the rest (R. 1361). Apex apparently waited until the following September before disposing of the remaining equipment, while Leir himself made efforts to sell it to third parties (R. 1289-90). Thereafter, according to Bayer's recollection, Apex ultimately abandoned the remainder (R. 1337-38).

There was no evidence whatever, contrary to petitioners' assertion in their brief (page 47), that Apex agreed to stay out of the vanadium business in return for VCA's purchases. The memoranda on which petitioners rely are precisely to the contrary.

The first states that as of February 20, 1942, "they [Apex] have decided to go out of the vanadium business"

and "would like" to dispose of their equipment (Exhibit 62, Vol. VIII, R. 163, R. 671). The memorandum specifies (R. 163-64):

> "Mr. Christiansen further stated that they had been contemplating going out of the Vanadium business for some time and their definite decision was reached for two reasons. First, that they had a fire in this department of their plant and secondly, that the sales contract which they had with Mr. Leir, President of the Continental Corporation, had not worked out very well."

Apex's determination to quit the business was temporarily suspended by Leir's threats (Exhibit 62, Vol. VIII, R. 167-68, R. 671), but within two months Apex "had" come to an agreement with Leir, "had definitely concluded" to go out of the business, and their equipment was "now" for sale (Exhibit 62, Vol. VIII, R. 168, R. 671). Apex was then "anxious to move these items as quickly as possible" because it was "greatly in need of space" for its aluminum business (Exhibit V-2-H, R. 2530, 1359).

There is not a suggestion anywhere in the memoranda that VCA influenced the Apex decision at all or came to any understanding with Apex until after Apex had reached its final decision to quit the business.

There Was No Evidence of the Claimed Interference With Climax and With Continental's Business in Canada.

Petitioners' claims of interference with their relationships with Climax Molybdenum and with their Canadian business depend on the same evidence, which is an asserted conversation of Wolf with one M. D. Arrouet. There is no other evidence of any kind relating to Climax.

The only other evidence concerning petitioners' business in Canada is that some months prior to the Arrouet conversation, the Electro Metallurgical Company of Canada, a Canadian corporation and a Carbide subsidiary, was appointed agent of the Government of Canada to buy vanadium for all the Canadian steel mills and, at that time, chose to buy from suppliers other than Continental; thereafter, it continued to decline Continental's offers of sale except on one occasion.

Such evidence was all excluded, with the exception of certain preliminary questions, upon the ground (to be discussed hereafter) that the acts to be shown were not cognizable under the antitrust laws and upon the further ground that the Arrouet conversation was incompetent.[24] Respondents here propose to support the alternative ground, and to demonstrate that the evidence was wholly incompetent and non-probative. The issue rests upon the sufficiency of the offer of proof made at trial (R. 808-51), together with the testimony actually permitted in connection with the offer (R. 840-50).

Two established principles are pertinent as to the offered evidence so excluded:

(1) It is the offeror's burden to make error appear by means of his offer,[25] and accordingly the offer must show the competency as well as the materiality

---

[24]R. 847-48: "The objection will be sustained. The statement of a mere employee would not be binding upon a corporation unless it is shown he had authority to act."

[25]*Origet v. Hedden*, 155 U.S. 228 (1894). See *Cropper v. Titanium Pigment Co.*, 47 F.2d 1038, 1042 (8th Cir. 1931).

of the evidence[26] and also its probative value, or the exclusion will not be prejudicial;[27]

(2) Whether Arrouet's statement be regarded as an admission or as a verbal act, the issue of admissibility is a preliminary question for the court to determine, and accordingly no jury question was or is presented.[28]

It follows that general statements by petitioners' counsel that respondents in New York "directed" or "controlled" the events in Canada are to be disregarded; general statements that "Carbide" threatened petitioners are to be disregarded; general statements that Arrouet was "very important," or that he was authorized or designated to speak, are to be disregarded. It is the specific proof offered that counts, and if petitioners had none, then the offer of proof was properly rejected and cannot be error.

Arrouet was supposed to have said that Continental should stay out of the vanadium business and that Climax should too, or else the Carbide companies might take reprisals (Exhibit 109 for ident., Vol. IX, R. 467-68, R. 834, R. 828-29). Counsel for petitioners sought to prove

---

[26] *Herencia v. Guzman*, 219 U.S. 44, 46 (1910); *Gantz v. United States*, 127 F.2d 498 (8th Cir. 1942); *Hoffman v. Palmer*, 129 F.2d 976, 994 (2d Cir. 1942), *aff'd*, 318 U.S. 109 (1943).

[27] *Talon, Inc. v. Union Slide Fastener, Inc.*, 266 F.2d 731 (9th Cir. 1959); *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906 (2d Cir. 1962); 28 U.S.C., Sec. 2111; Rule 61, F.R.C.P.

[28] *Cliquot's Champagne*, 3 Wall. (U.S.) 114 (1865); *Gila Valley Ry. Co. v. Hall*, 232 U.S. 94 (1914); *Massei v. United States*, 241 F.2d 895 (1st Cir. 1957), *aff'd per curiam*, 355 U.S. 595 (1958); *McDonald v. Coop. Restaurant, Inc.*, 64 F.2d 383 (App. D.C. 1933); *Congregation Ohab Shalom v. Hathaway*, 104 N.E. 379 (Mass. 1914); 9 Wigmore, *Evidence*, Sec. 2550 (3d Ed. 1940).

the conversation solely through the testimony of Martin Wolf and through correspondence and memoranda not written by Arrouet (R. 808, R. 826-29, Exhibits 80-109 for ident., Vol. IX, R. 4384-6s, R. 834), and accordingly the key issue of admissibility was as to Arrouet's authority from respondents to say or do what he was alleged to have done. Counsel for respondents specifically objected to the testimony on the ground that no authority was shown (R. 846).

Petitioners' counsel sought to meet the objection of lack of authority in two ways: (1) by the testimony of Martin Wolf as to his understanding of Arrouet's position; (2) by letters and testimony assertedly showing that Wolf was referred to Arrouet by persons authorized to do so. These theories will be considered in order.

It was, and is, conceded that Arrouet at the time was an employee of Electro Metallurgical Company, an American corporation and a wholly owned subsidiary of Union Carbide, which was named but not served as a defendant below. It was also stipulated that Arrouet was not an officer of Electro Metallurgical Company (R. 827). There was no contention that Arrouet was employed by any respondent company, or was connected with any respondent at all, other than as an employee of a subsidiary or affiliate.

As to the scope of Arrouet's responsibility, Wolf's hearsay testimony was (R. 847):

> "I didn't know what his exact position was. I knew he had no title, but he had a very big office."

Wolf further testified by hearsay that Arrouet was "involved in certain purchasing operations, as far as I

learned" and that it was almost "raw material procurement in a vaster sent (sic.)" (R. 849-50). This was all of the testimony.

In this testimony then, even if the hearsay is credited, there is no showing that Arrouet was a managing agent, much less an executive officer, or that he had any business making statements about the policy of his company or any parent or affiliated company. There was no indication that he was concerned in his work with the export of oxide to Canada, or with the vanadium business at all, or with the molybdenum business, or with the relationship of any Carbide company to any other company. The offer of proof was merely that he was an employee engaged in purchasing for Electro Metallurgical Company in New York.

The employee status so shown carries with it no power to make statements concerning company policy or to make admissions on behalf of the employer. *Winchester & Partridge Mfg. Co. v. Creary*, 116 U.S. 161 (1885); *Washington Gas Light Co. v. Lansden*, 172 U.S. 534 (1899); Restatement (2d Ed.) *Agency*, Secs. 33, 34, 286, 288 (1958). So it has been consistently held that hearsay evidence of threats made by an agent with limited authority is inadmissible. *McDonald v. Coop. Restaurant, Inc.*, 64 F.2d 383 (App. D.C. 1933); *Nichols v. Republic Iron & Steel Co.*, 89 F.2d 927 (5th Cir. 1937); *United States v. Konovsky*, 202 F.2d 721 (7th Cir. 1953). Directly in point is *Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir. 1957), *cert. denied*, 355 U.S. 835 (1957) in its discussion of inadmissible threats by unauthorized persons in what is described in the opinion as "Conversation No. 1." The converse is

Johnson v. J. H. Vest Lumber Co., 117 F.2d 53 (8th Cir. 1941) where similar statements made by "managing agents" were held admissible.

Thus Arrouet had no authority, by virtue of his mere employment, to make policy statements on behalf of his employer, Electromet, and none at all on behalf of the respondents Carbide, USV and VCA.

As to the supposed reference of Wolf to Arrouet, Wolf again was permitted to testify directly (R. 847-50). He said that he had been "directed" to see Electromet in New York (R. 847) but did not say who had directed him. He said "we were told" to send a letter to Mr. Walker of Electromet, but again he did not say who did the telling. Petitioners' Exhibit 80, however, specifies that it was Mr. Bateman who "suggested" that Continental see Electromet (Vol. IX, R. 438, R. 834). Bateman was no employee or agent of any respondent or subsidiary, but in fact was the Metals Controller of Canada. Thus there was no reference by Electromet of Canada to Electromet in New York.

Wolf accepted the unauthorized suggestion and wrote to Walker of Electromet. He testified that after that he got a telephone reply from Arrouet and went to see him (R. 848-50). From this, petitioners argue that Arrouet was in effect designated to speak on behalf of Walker and assume that Walker, as a Vice President of Electromet, had authority to designate him.

But there is no showing at all that Walker had anything to do with exports to Canada, or purported to designate Arrouet to say anything. Presumably, he asked Ar-

rouet to find out exactly what Continental wanted, and why it was directing its complaint to the American company at all, and then to report back to him. If there is any more positive inference, it is that Walker told Arrouet specifically to refer Continental back to the Canadian company, *for this is just what Arrouet did*, according to petitioners' next letter, addressed to Arrouet (Exhibit 81 for ident., Vol. IX, R. 439, R. 818):

> "You requested us to contact the Electrometallurgical Company in Welland[29] and submit our offer to them."

Continental so understood it, for thereafter it corresponded exclusively with Electromet of Canada and the office of the Metals Controller (Exhibits 82-108, Vol. IX, R. 411-466). In other words, the *only* indication from the correspondence is that Arrouet had no authority at all, and neither did Electromet in New York, and both Arrouet and Wolf were fully aware of these facts.[30]

It was not until five months later that Wolf saw Arrouet again, according to his memorandum, and *at that time* assertedly received the threats complained of (Exhibit 108 for ident., Vol. IX, R. 467-68, R. 826). Continental had not in the meantime been told to see Arrouet again by anyone, so far as the proof shows. Thus at the time of the supposed threats there was no reference or designation

---

[29]Welland, Ontario, the address of the Electro Metallurgical Company of Canada.

[30]Even if Wolf were not fully aware of Arrouet's lack of authority, the result would be the same. Actual, not apparent, authority is required before an agent's statements are imputable to the principal. Restatement (Second), *Agency*, Sec. 286, comment b.

by anyone. Wolf simply chose to see someone whom he had previously met in Electromet, who had already told him that he should address any complaints to the Canadian company.

Moreover, even assuming that there was any reference, there was no evidence at all as to what it was. An authorization by reference or designation is of course limited to the subject matter that the agent is expected to discuss. *Allen v. Killinger*, 8 Wall. (U.S.) 480 (1869); *Insurance Co. v. Mahone*, 21 Wall. (U.S.) 152 (1874); *Garey v. Kelvinator Corp.*, 271 N.W. 723 (Mich. 1937); 4 Wigmore, *Evidence*, Sec. 1070 (3d Ed. 1940). The fact that the agent later exceeds whatever authority he had does not, of course, prove that he had it in the first place; even if he declares he has it, his authority cannot be so proved by hearsay. *Durant Motor Co. v. Georgia-Florida Motor Co.*, 18 F.2d 95 (5th Cir. 1927); *Hotel Atlantis, Inc. v. Peerless Casualty Co.*, 285 F.2d 257 (2nd Cir. 1961); 1 Mechem, *Agency*, Sec. 285 (2d Ed. 1914). Here, Arrouet did not even purport to be speaking with anyone's authority, so far as the offer of proof shows. Thus there was a total failure to show that Wolf was referred to Arrouet for a statement of policy, or a threat, or anything of the kind he is claimed to have said.

To sum up: Arrouet was in fact a mere employee without actual or apparent authority to say anything about vanadium exports. If he said what is claimed, he did so without the knowledge or approval of his employer or of anyone else, including the respondents. This is the total offer of proof. It follows that under no theory was the Arrouet conversation admissible.

For much the same reasons, had the conversation been admitted, it would have proved nothing. If a responsible officer of a company utters threats, that may well constitute circumstantial evidence tending to prove that some action was taken or some result followed. But that an employee without power to act or make policy utters such statements is, if shown, entirely meaningless. His opinion, as such, has no independent significance, for he is not in a position to translate that opinion into action.

Here, of course, there is not the slightest evidence that anyone in authority, or anyone else at all, even knew of Arrouet's supposed threats, much less approved them or acted upon them. No one is shown to have communicated with or troubled Climax in any way. No one from Electromet or Carbide in New York is shown to have communicated with Electromet of Canada with regard to Continental or anything else, or otherwise to have influenced the decision of that company. Of course, it cannot be presumed, assumed, or inferred that it did so merely because of the bare corporate relationship.[31] Nor does it aid the inference that, five months *after* the Canadian company acted, a purchasing agent in New York was heard to utter unauthorized opinions or threats.

The result is that there was no evidence, competent or incompetent, that anyone interfered with Climax or Continental's business in Canada.

---

[31]No evidence was offered that Electromet of Canada had officers or directors in common with those of any other Carbide company, nor is there any other indication of parental control or direction, or a principal and agent relationship. The single fact of ownership of one corporation of another has never been regarded as sufficient to show any of these things. 1 Fletcher, *Corporations*, Sec. 43, pages 157, 158, Note 70, and cases cited.

The offer of proof was totally lacking in still another respect. If there had been a wrongful interference which resulted in the loss of a customer, it still would be incumbent on petitioners to show that the loss injured them. But petitioners' whole theory was that they were short of *supplies*, and that they could sell all they could produce. Wolf so testified (R. 845), and these are the claims of the complaint (paragraphs 34, 35, R. 18-19). All of their attempted proof of damages was based on the hypothesis that they could not get enough supplies and could sell all that they produced (R. 852-63, 1107-13). If this was so, if customers were clamoring for vanadium which Continental could not produce for lack of supplies, then the loss of Atlas Steels would mean nothing. Continental would readily sell to someone else. Petitioners in fact carefully avoided showing that they could *not* replace the lost customer (if this were indeed the fact), for to make such proof would have destroyed the remainder of their case.

The result is that the claim of interference is irrelevant here, even if the fact of interference were shown by the offer. Petitioners chose not to couple with their offer as to interference any offer as to damage resulting from the interference, and instead relied throughout the trial upon the opposite theory of damages. The claim of interference is therefore not related to their showing of the fact or amount of damage, and is immaterial here.

For all of these reasons, the offered evidence has no bearing upon this review.

There Was No Evidence of Any Interference With Any Plan to Build a Mill.

Petitioners make a claim for the first time on this review that there was an interference with their forming an association for the purpose of "building a mill" by means of respondents' acquisition of the Durango mill (pages 61-62).

Respondents are at a loss to understand the statement of the claim or what the claim is supposed to be. The cited evidence concerning the claim (Exhibit V-2-K, R. 2533-44, 1715, 1775-77) shows that Continental and Blanding were then discussing the enlargement and reopening of the existing Blanding mill, together with a requirement or output contract, but that Leir was not interested in committing Continental financially or otherwise, and the plan collapsed. Incidental to this negotiation, they discussed formation of an association of producers, the apparent purpose of which was to fix prices (R. 2549-50). The only reference to "building" a mill, made by Bigler of Blanding on cross-examination, clearly referred to the proposed enlargement of the existing Blanding mill (R. 1775-76).

How the respondents' acquisition of the Durango mill could possibly have affected any of these plans at Blanding is never indicated in petitioners' brief and certainly does not explain itself.

IV

PETITIONERS AVOIDED AND OMITTED ALL PERTINENT EVIDENCE RELATING TO THE ASSERTED LOSS OF SALES AND PROFITS.

A plaintiff in an antitrust action proves his damage by means of two essentially different demonstrations: (a) he proves the *source of the injury*, by showing the adverse relationship of defendants' acts to the characteristics and needs of his own business; (b) he proves a *financial loss*, ordinarily by demonstrating a loss of sales and consequent loss of earnings. The latter aspect of the proof often goes only to the amount of damage, the fact of damage being already clear; but in a case where the injurious impact is itself doubtful, the inquiry into the relevant sales and earnings figures may be decisive.

In the present case not only did petitioners fail to show that any of the respondents' acts affected their business needs, as discussed in the preceding sections of this brief; they also failed to offer relevant evidence, although it was fully available to them, to prove they in fact lost sales and profits.[32] The failure was so total that it is pertinent here: that is, it confirms the fact no damage verdict at all could have been rendered.

There Was No Evidence of Lost Sales.

Petitioners' first and major task was to prove that they had actually lost sales as a result of respondents' acts. Some type of proof was required that their sales would

[32] No attempt was made to prove any other type of damage (loss of capital values, out-of-pocket expense, etc.).

actually have been greater than they were, but for the claimed supply restrictions and the other asserted interferences.

In the present action, the nature of the proof was simple if the fact existed. This was not like a moving picture case where the plaintiff exhibitor has thousands of nameless customers and must show a loss of sales entirely by revenue comparisons. Continental had a total of only about a dozen domestic customers (Exhibit 79, R. 2169-74, 797), and its potential customers were only those relatively few concerns that were engaged in making vanadium-alloy steels.

If any of those customers had been lost because Continental did not have the necessary supplies, the fact would have been spread upon Continental's own contemporaneous records and files, which were fully available. The facts would also have appeared in the customers' files, if those files existed, and, if not, they would be remembered by the customers' employees who were interested in purchasing. In the case of Atlas Steels, the one customer Continental did lose, at least temporarily (for reasons elsewhere described), petitioners had no difficulty at all in proving the fact by their own records.

Yet with that one exception, Continental offered no evidence of any lost sales. No contemporaneous correspondence or records were introduced to prove such losses; no witness from any customer or potential customer so testified on trial or by deposition; even Leir and Wolf never so testified. *There was a total failure to prove lost sales, in a case in which such evidence was fully available.*

What petitioners actually did offer was the following: (1) they offered in evidence their record of net worth and sales in *all products* and their sales in *fluorspar* (Exhibits 123, 124, 125 for ident., Vol. IX, R. 536-40, R. 1097, 1103, 1106) and then asked that the jury be permitted to infer that their sales of *vanadium* should have followed the same trend (Exhibit 126 for ident., Vol. IX, R. 541, R. 1106-07); (2) they offered in evidence computations of sales based upon assumed shares of the market—their market share in 1941 (Exhibit 139 for ident., Vol. IX, R. 543, R. 1261-62), their possible share if they produced and sold at the maximum capacity of Apex (Exhibit 140 for ident., Vol. IX, R. 544, R. 1262-63), and finally their "share" of sales based on arbitrary shares of the market from 1% to 15% (Exhibit 141 for ident., Vol. IX, R. 545-46, R. 1263-64)—and asked that the jury be permitted to guess at some one of the offered figures.

There was no evidence offered that vanadium was materially similar to any of the other materials traded by Continental, or that petitioners' vanadium business would have paralleled its other businesses in any respect. The undisputed evidence showed the opposite. Vanadium was the only product Continental attempted to process (with associates); the others it simply traded (R. 1198-99). Vanadium was also a war industry—in terms of supply, demand, costs, and prices—and there was no evidence offered that the other materials sold by Continental were similarly affected, at the same times, to the same extent, or at all. Vanadium and fluorspar, in particular, as Wolf admitted, "have nothing in common as materials" (R. 853), and in fact were used for different purposes (R. 785,

853). There was no evidence that the trend in sales, prices and production costs of the two materials was comparable at all.

Nor was there any evidence offered that Continental should in the normal course have had or maintained any particular share of the vanadium market, or any share at all. No expert or anyone else so testified. There was no evidence from the people in the steel mills, who, in this case, constituted the entire potential demand. The only evidence was that Continental's share was temporary: Apex was unwilling to invest time or money in the business on a permanent basis; so were Imperial and Climax; and Van-Ex was nothing but black market oxide. Thus none of the offered evidence reasonably supported the assumption that Continental ever developed any permanent customers, much less a specified share of the permanent market. Without this assumption the market-share approach had no rational relation to the case.

The result was that there was no evidence of lost sales.

There Was No Evidence of Lost Profits.

Had petitioners proved lost sales, their next task would have been to show that they would have made a profit on such sales. Without profits there would have been no damage. *Yet petitioners never showed their actual profit experience in any of their vanadium ventures at any time.*

The evidence offered shows the net profit for the *company as a whole* (Exhibit 121 for ident., Vol. IX, R. 469-535, R. 1095-96, 1087-88) and the *gross* profits for vanadium (Exhibit 119, R. 2213, 1090) but that is all. It is entirely unknown what net profits, *if any*, Continental

made in exporting oxide, and in making Van-Ex, and in making and selling ferrovanadium. It was admitted that Apex *lost* money (Exhibit V-2-B, R. 2520-22, 1192), but the jury was never told whether Continental made any net profit on its commissions and, if so, how much.

Thus Leir admitted on cross-examination (R. 1225):

> "Q. Yes. In other words, you have a gross profit figure there from which matters such as overhead, and whatever goes into overhead, have not been deducted?
>
> A. I would say so."

And again (R. 1227):

> "Q. (By Mr. Archer): Now, the 'Commission earned' is, again, a gross commission, is it not?
>
> A. A gross commission, out of which we would pay all our expenses, for traveling and advertising, and so on."

The gross profit figure is thus meaningless.

Once again, the relevant evidence was fully available. Nothing was to prevent petitioners from computing a reasonable allocation of their expenses to apply to their vanadium business and offering the same. Only they could have adduced the figures required for the computation. They never did so. Whether such an allocation would have shown that they were in fact operating at a loss in vanadium no one can tell.

Instead of showing what their net profits actually were and what, by projection of lost sales, the profit might have been, petitioners offered a table showing *respondents'* net profits in both *vanadium and uranium* (Exhibit 20 for

ident., Vol. VIII, R. 217-18, R. 130). No basis for any comparison was shown. The parties were scarcely in the same business: (a) respondents had their own ore, their own mills, their own conversion plants, their own research and sales promotion staffs, while Continental had none of these and was largely a commission broker; (b) respondents were heavily involved in uranium as an integral part of their busines while petitioners were not but, instead, were largely concerned with fluorspar; (c) respondents had a large part in contemporaneous Government programs, with which Continental had nothing to do. Thus the profit figures could not have been compared, even if properly presented, for the businesses were non-comparable. However, the exhibits themselves added to the total disparity. Petitioners' figures, of course, were for *gross* profits in *vanadium;* respondents' were for *net* profits in *vanadium and uranium.* Thus the profit figures were in themselves non-comparable, even if the businesses of the parties had been similar.

The result was that there was no evidence of any kind that Continental had ever made money in the vanadium business or would have done so under any projected set of circumstances.

V

AS A MATTER OF LAW, THE RECORD FAILS TO SHOW ANY INJURY OR DAMAGE.

The foregoing is the record relating to the damage claim. On such facts, there is no legal issue fairly presented unless it can be questioned whether proof of injury is required in a private antitrust case.

The parties agree that the principles expressed by this Court in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), and *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555 (1931), are controlling, but disagree not only as to their application but also as to what those principles are.

Petitioners, having in mind various statements of Burwell that he and his company intended to injure them, assert at the outset of their legal argument that "* * * intentional acts aimed at the destruction of competitors are actionable by those who are the objects of the restraints" (page 74). The same thought is expressed in various ways thereafter (pages 74-90), the argument appearing to be that, if respondents wanted to put Continental out of business, and performed various acts intended for the purpose, and, if later Continental actually did go out of business, then the fact of damage is shown.

If this argument were accepted, it would destroy the statutory requirement that a damage claimant show actual injury to his property or business. Logically it is indefensible. An act intended to injure may or may not cause injury, and, if it does not, it is totally immaterial that the result intended actually comes to pass.[33] The crux of any damage case is that the wrongful act *in fact* caused the result of which plaintiff complains.

Story Parchment and *Bigelow* do not purport to abrogate the statutory requirement that damage be proved as a fact. In both of the opinions the fact of damage was

[33]The argument has been specifically isolated and rejected before. *Talon, Inc. v. Union Slide Fastener, Inc.*, 266 F.2d 731, 737-38 (9th Cir. 1959).

regarded as clear, and the issues turned on the sufficiency of proof as to the amount. So in *Story Parchment*, where predatory price cutting by all of plaintiff's competitors forced it to lower its own price, this Court held the evidence sufficient to show that petitioner was "injured in its business and property as a result of this unlawful combination" (282 U.S. at 560) and added (page 562):

> "It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

The same principles were approved in *Bigelow*, the Court reviewing *Story Parchment* and *Eastman Kodak Co. v. Southern Photo Co.*, 273 U.S. 359 (1927), in the following language (327 U.S. at page 264):

> "In each case we held that the evidence sustained verdicts for the plaintiffs, and that in the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs."

The evidence of discriminations in release dates forced upon plaintiff by his major suppliers, together with a

before-and-after comparison of his receipts, was, the Court found (Justice Frankfurter dissenting), "ample to support a just and reasonable inference that petitioners were damaged by respondents' action" (page 266).

Thus the reasoning of the *Story Parchment* and *Bigelow* cases is that the fact of damage, or causation, must be shown with some reasonable certainty, the exact degree of which is not specified.[34] It must, however, be proved as a fact. It is not to be assumed from the existence of the wrongful acts themselves, nor is it to be presumed, as petitioners further suggest, upon some policy of aiding the enforcement of the antitrust laws. The governing act might have been so framed, but it was not; it specifically requires proof of injury, and the cases proceed accordingly.

There Is No Evidence of Wrongful Acts Having a Tendency to Injure Petitioners.

The review of the evidence contained in the previous sections of this brief may be summarized in a few sentences.

Leir admitted on the stand the adequacy of his supplies in 1940 and early 1941, when he was reselling oxide not needed for the Apex contract. He admitted the adequacy of his supplies in early 1942, when the Apex contract was terminating. He admitted the adequacy of his supplies in early 1943 when the Van Ex production neared its end and he was arranging the Climax contract. He stated that

[34]Two frequently cited lower court opinions to this effect are *Momand v. Universal Film Exchange*, 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949); *Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir. 1957), *cert. denied*, 355 U.S. 835 (1957).

he wanted no supplies from the Colorado Plateau in a letter early in 1944, shortly after he signed his contract with Imperial. Thus there were admissions of adequate supplies at each crucial period. Petitioners' contemporaneous records further show that Continental and its associates refused or declined to buy offered and available supplies in 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948 and 1949—that is, in every single year for which damages are claimed.

There is a total failure of proof of interference by any respondent company with the Continental-Apex relationship, with the Continental-Climax relationship, with the Continental-Atlas Steels relationship, or with any plan of anyone's to build a mill. Petitioners failed to call any witness to testify at the trial, or by deposition, from Apex, Climax, Imperial or Atlas Steels, and failed to show that they were planning to build a mill. The few documents that they adduced gave rise to no inference of interference.

This record is dispositive of the claim.

Petitioners argue at length that respondents controlled much of the supply of oxide and wrongfully refused to sell, and that they wrongfully interfered with petitioners' other sources of supply. Respondents deny both assertions, but need not dispute them here. The decisive consideration is that, whatever respondents may have done, *petitioners in fact had more than adequate supplies.* Any attempted restrictions of their supplies are irrelevant because on the facts of this case they could not have caused injury.

The same reasoning is implicit in *Standard Oil Co. of California v. Moore*, 251 F.2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958), and respondents submit that it is sound. The court stated the issue as "whether Moore was unable to obtain a supply of petroleum products which would permit him to remain in business" (251 F.2d at 198). It found the evidence sufficient for a jury verdict, but, in doing so, it examined into each of Moore's sources of supply to reach the conclusion that no adequate source remained.

Petitioners argue (pages 96, 104) that there is a phrase in Apex's letter of November, 1941 (Exhibit V-I-Q, R. 2512A) to the effect that Apex did not have enough oxide to run its production at capacity. The statement was factually true, for Apex had never run anywhere close to capacity, but this was Apex's own choice. As the cited letter itself shows, Apex was at this very time turning down the National Vanadium supply because it did not wish to commit itself ("We feel it is entirely too dangerous to tie up for a five year contract, in fact for any length of time") and because business might decline (a more flexible contract "would take care of us so that if business dropped off entirely, we would have no obligations") (Exhibit V-I-Q, R. 2512). Apex had made the same choice throughout the history of the contract, and this was no exception.

Leir fully recognized all of this at the time, in his reply to the letter cited. He noted that the National Vanadium mill was expected to produce 80,000 pounds per month, "many times the output of Shattuck and Blanding," and that if Apex had any concern about raw materials "one

would think that you would be anxious to tie up this new vanadic acid production" (Exhibit V-Q, R. 2513). He sought to assure them that their supplies would not then be excessive:

> "It would then be a question only of how to manage the output from Shattuck, Blanding, and Gateway. We think you can rely on us to make larger sales of ferrovanadium, in the same proportion in which we obtain raw material."

But Apex had no desire to test the proposition.

The same observations apply to the Apex letters of December, 1941, to the OPM and the Defense Plant Corporation (Exhibit 144, 146, R. 2266-75) as discussed in petitioners' brief (pages 103-04). The letters never state that Apex had inadequate supplies for existing orders, or for any existing need, but that for Apex to operate at a capacity of 50,000 to 60,000 pounds per month it would need more supplies (R. 2275). Apex, of course, had never operated at anything like this capacity, but produced only a little over 100,000 pounds during the entire contract period, or an average of about 5,000 pounds per month during the two years of actual operation (Exhibit 119, R. 2242, 1090, 1351). Thus these letters, which Leir insisted on, and himself drafted,[*] were concerned with "future operations" at a "distant date", as Bayer put it in his testimony (R. 1358). Apex itself had no interest in

[*] Petitioners concede that the letters were written "at the urging and insistence of Mr. Leir." Pet. Brief, page 103, and in fact they were drafted by him and the drafts sent to Apex (Exhibit 144, 146, R. 2266-75, 1354-55).

the allocations, for it had decided to leave the business, but Leir still hoped that Apex would agree to a larger operation (Exhibit V-2-A, R. 1176-85), and also was by then actively sounding out customers for his Van Ex (R. 1159-60). Thus Leir, using Apex as a front, sought to secure allocations for whatever future business he might develop. Under no interpretation was there a present or existing need.

Petitioners can point to nothing else having any bearing on the adequacy of supplies for the Apex contract, and they fail entirely to explain the refusals to buy, the 50,000-pound supply existing at the end of the contract, Leir's admissions of the adequacy of his supplies, and the correspondence which specifies that other causes were exclusively responsible for the termination.

Petitioners do not even contend that supplies were insufficient for the Climax contract (Pet. Brief, pages 105-08). They say with regard to the Van Ex venture that the Nisley production "could not" have been available because of Nisley's toll agreement with the MRC (Pet. Brief, pages 109-11); they fail, however, even to discuss Continental's own correspondence showing a continuous refusal to buy the Nisley supply, or to mention their successful purchase from the MRC mill at Durango, or to explain their failure to make any other requests of the MRC. As to the Imperial contract, petitioners' total argument is that respondents refused on one occasion to sell to them before the contract even began (Pet. Brief, pages 108-09). They never discuss or mention the vast supplies that were available, from respondents and others, from the beginning to the end of the contract period.

There is, in short, no conflict on the pivotal fact that petitioners had adequate supplies for each of their ventures and so could not have been injured by any supply restriction, if any were proved. No other restraint was the subject of evidence.

There Was No Evidence of Loss of Sales or Loss of Profits.

The second aspect of the proof of damages is no less important here, for when it came the petitioners' turn to show from their records that they actually lost sales and profits, they failed to produce the only probative evidence and insisted upon guesswork.

Two established principles control as to this facet of the proof. The first is that enunciated in *Bigelow*, 327 U.S. at 264:

> "In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly."

Here, the jury was invited to speculate with no "relevant data" at all.

The second principle is a corollary of *Bigelow* and relates to the fact that here the best available evidence of loss of sales and profits was carefully avoided. As Judge Kirkpatrick stated it in *William Goldman Theatres v. Loew's, Inc.*, 69 F. Supp. 103, 106 (E.D. Pa. 1946), *aff'd.* 164 F.2d 1021 (3rd Cir. 1948), *cert. denied*, 334 U.S. 811 (1948), referring to the *Bigelow* principles:

> "Of course he [the plaintiff] must always produce all the evidence he can * * *."

The same requirement is stated in *Riss & Co. v. Association of American R.R.'s*, 190 F. Supp. 10, 18 (D.C. D.C. 1960), *rev'd on other grounds*, 1962 T.C., ¶ 70,204 (D.C. Cir. 1962); and see *William H. Rankin v. Associated Bill Posters of the United States*, 42 F.2d 152, 155 (2nd Cir. 1930), *cert. denied*, 282 U.S. 864 (1930); *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416, 427 (10th Cir. 1952), *cert. denied*, 344 U.S. 837 (1952); *Herman Schwabe Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 910 (2nd Cir. 1962). The rule is directly related to the presumption that available evidence not produced would be adverse. *Clifton v. United States*, 4 How. (U.S.) 89 (1845); *Galloway v. United States*, 319 U.S. 372, 385-87 (1943); 2 Wigmore, *Evidence*, Sec. 285 (3d Ed. 1940). It is also the converse of the *Bigelow* theory that "defendant by his own wrong has prevented a more precise computation" (327 U.S. at 264). Where the evidence is in fact available, but the plaintiff avoids it, the reason for the *Bigelow* liberality disappears.

The failure of petitioners in this case to show lost sales should in itself be decisive. Instead of showing that there were in fact unfilled orders or requests, and from whom and how much, the evidence of which was necessarily available, and available only to petitioners, petitioners relied exclusively on estimates of market shares unrelated to any evidence whatever. The evidence as offered was wholly nonprobative, and no jury verdict based on it could have stood. *Emich Motors Corp. v. General Motors Corp.*, 181 F.2d 70, 83-84 (7th Cir. 1950), *rev'd on other grounds*, 340 U.S. 558 (1951); *Wolfe v. National Lead Co.*, 225 F.2d 427 (9th Cir. 1955), *cert. denied*, 350 U.S. 915 (1955); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 391-93

(9th Cir. 1957), *cert. denied*, 355 U.S. 835 (1957); *Wisconsin Liquor Co. v. Park & Tilford Distillers Corp.*, 267 F.2d 928 (7th Cir. 1959); *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906 (2nd Cir. 1962); *Clapper v. Original Tractor Cab Co.*, 165 F. Supp. 565, 580-82 (S.D. Ind. 1958), *aff'd in part*, 270 F.2d 616 (7th Cir. 1959), *cert. denied*, 361 U.S. 967 (1960); *Delaware Valley Marine Sup. Co. v. American Tobacco Co.*, 184 F. Supp. 440, 446-47 (E.D. Pa. 1960), *aff'd*, 1961 T.C., ¶ 70,170 (3rd Cir. 1961); *Siegfried v. Kansas City Star Co.*, 193 F. Supp. 427, 436 (W.D. Mo. 1961), *aff'd*, 298 F.2d 1 (8th Cir. 1962).

Equally inexplicable and equally destructive of any rational proof of damage was petitioners' failure to show their actual net profits in vanadium. Their "gross profits" were meaningless in the absence of a basis for estimating expenses and thus arriving at net profits.[36] *Wolfe v. National Lead Co., supra*, at page 431; *Delaware Valley Marine Sup. Co. v. American Tobacco Co., supra*, at page 448; *Siegfried v. Kansas City Star Co., supra*, at page 436. The profit made on *all* petitioners' businesses, especially in fluorspar, was obviously no indication of what they might make in vanadium. *Ronson Patents Corp. v. Sparklets Devices*, 112 F. Supp. 676, 692 (E.D. Mo. 1953), *aff'd*, 202 F.2d 87 (8th Cir. 1953). The amount of profit made by respondents was even more irrelevant, because their integrated vanadium-uranium businesses were different in all material respects from petitioners' trading ac-

[36] In Kohler, *A Dictionary for Accountants*, "gross profits" is defined as "net sales, less cost of goods sold and inventory losses, but before considering selling and general expenses, incidental expenses, and income deductions."

tivities. *Fargo Glass & Paint Co. v. Globe American Corp.*, 201 F.2d 534, 540-41 (7th Cir. 1953), *cert. denied*, 345 U.S. 942 (1953); *Flintkote Co. v. Lysfjord*, *supra*, at pages 393-94; *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, *supra*, at page 911. Thus there was no evidence showing net profits. In the absence of it, in an industry with variable expenses and profit rates, there was no permissible assumption that profits were automatic or guaranteed. *A fortiori* was this the case where petitioners' principal associate had actually lost money. Certainly, no jury could first presume profit, where none was shown, and then pick a rate of profit out of thin air. *Baush Mach. Tool Co. v. Aluminum Co. of America*, 79 F.2d 217, 227 (2nd Cir. 1935); *Wolfe v. National Lead Co.*, *supra*, at pages 431-32; *Flintkote Co. v. Lysfjord*, *supra*, at pages 391-94. See *Talon, Inc. v. Union Slide Fastener, Inc.*, 266 F.2d 731, 737-38 (9th Cir. 1959).

Thus in a case where the precise proof was at hand petitioners asked for a verdict "based upon speculation or guesswork" and now purport to rely on *Bigelow* for justification. The reliance is misplaced. Neither *Bigelow* nor any other case has ever sanctioned a deliberate avoidance of the facts from one having the burden of proof. The aid of *Bigelow* is intended for those who prove all they can and in so doing are able to demonstrate at least the substance of a meritorious claim.

Upon All Aspects of the Claim Petitioners Failed to Tender an Issue.

The present action is similar in one aspect to *Galloway v. United States*, 319 U.S. 372 (1943). There, as here, the best and most probative evidence was withheld, with

the result that the fact to be proved might be presumed against the claimant.

Unlike *Galloway*, however, there is here no difficult question of what inferences are possible from equivocal or fragmentary facts. In the case at bar, the petitioners' own records and admissions resulted in a full and adverse proof upon the precise factual issue, leaving no conflict as to the evidentiary facts. Respondents therefore make no choice between the differing views of the function of judge and jury which were expressed in *Galloway*. Even accepting the stricter of the tests advanced, there is in this case "no room whatever for honest difference of opinion over the factual issue in controversy."[37]

Under the tests set forth in *Bigelow* and *Story Parchment*, the result is the same and perhaps still more clearly apparent. Upon the whole record there is no just and reasonable inference of damage; even less is injury the certain result of the wrong. On the contrary the claim is here destroyed, at its crux, by petitioners' own admissions and undisputed records, to such extent that petitioners' failures are to a certainty not the result of the claimed wrong.

Even if this were not the case, the result would be the same, because the petitioners here chose to take their chances and rely upon speculation, unrelated to any evidence in the case, to prove their actual losses. They

---

[37] Dissenting opinion of Mr. Justice Black in *Galloway v. United States*, 319 U.S. 372, 407 (1943). Compare *Maynard v. Durham & Southern R. Co.*, 365 U.S. 160, 162 (1961), where the court found the evidence sufficient in one of its aspects but as to a different aspect, the subject of a pivotal admission, found "no evidence sufficient for a jury."

offered the jury no alternative. In their effort to build up a large claim, which the facts would not support, they forfeited any real claim which they conceivably might have had.

Petitioners therefore offered the court below no more choice than they offered the jury. Whatever the reasoning chosen, the result was unavoidable.

VI

ASSUMING THERE WAS EVIDENCE OF ANY INDUCEMENT OF THE CANADIAN GOVERNMENT'S ACT OF REFUSING TO BUY FROM PETITIONERS, NEITHER THE ACT NOR THE INDUCEMENT WOULD GIVE RISE TO ANTITRUST LIABILITY.

Respondents have already shown that no evidence was offered relating to petitioners' Canadian business except:

(a) the fact that Eletcro Metallurgical Company of Canada, a Canadian corporation and a Carbide subsidiary, while acting as agent of the Canadian Government to buy vanadium for the Canadian steel mills, declined to buy Continental's vanadium;

(b) hearsay evidence that an employee of Electromet in New York, a different Carbide subsidiary, five months later and without the knowledge or approval of his employer or of any respondent, assertedly told Wolf that Continental should stay out of the vanadium business in Canada.

The evidence therefore showed no connection between the respondents and the refusal to buy.

The court below, however, chose to rest its decision on this aspect of the case upon the ground that the damage-creating act was not within the purview of the antitrust laws,[38] and such is the issue presented by paragraph 5 of the writ of certiorari. Against the possibility that this Court will choose to review the question, the respondents argue it here.

At the time of the refusal to buy, Electromet of Canada was specifically charged by the Metals Controller of Canada, a government official, with the duty of purchasing on behalf of that government all of the vanadium needed by the Canadian steel mills, and then allocating it to those mills. This was conceded in the complaint (paragraph 36, R. 20) and at trial (R. 809), and it is now conceded in petitioners' brief, where it is said that Electromet of Canada had been given "the power in Canada to allocate and control the importation of vanadium into Canada" (page 112). It was also beyond dispute that when the agency was created in early 1943, Canada was in the midst of war and vanadium was a strategic material, so that the purchasing power given was in the interests of the national security of Canada in time of war.[39] Such

---

[38]As previously noted, *supra*, p. 47, the trial court recognized the incompetency the evidence, as well as its irrelevance under the antitrust laws.

[39]The emergency nature of the powers granted, and the broad scope of the powers, are set forth in the various Orders in Council as attached to the Memorandum of Defendants Union Carbide Corporation and United States Vanadium Corporation Regarding Actions Undertaken on Behalf of the Government of Canada in Time of War, which document was included in the second supplemental record transmitted to the Court by the Clerk of the United States Court of Appeals for the Ninth Circuit on November 8, 1961. The Orders are not part of the printed record.

power, granted in wartime, was validly delegated as a matter of Canadian law,[40] and petitioners do not question the validity of the agency.

It further appears from petitioners' own offered evidence that the Canadian Metals Controller acquiesced in and thus ratified the very course of action taken by Electromet of Canada when petitioners called it to his attention. According to the offer of proof, Wolf wrote directly to the Metals Controller on April 26, 1943, saying that Electromet of Canada should be required to purchase from Continental if the Canadian steel mills so requested, and asked for confirmation that this was the policy of the Metals Controller (Exhibit 91 for ident., Vol. IX, R. 449-50, R. 821). The Metals Controller's office replied on April 29, 1943, that Electromet of Canada was charged with the duty of purchasing and that (Exhibit 93 for ident., Vol. IX, R. 451, R. 821):

> "Having the above in mind, we suggest it is advisable you make your own arrangements with Electro-Metallurgical Company."

Thus the Metals Controller, being specifically advised of Continental's complaint, declined to intervene, but instead confirmed his agent's plenary authority.

The issue, then, is whether this government act of Canada, carried out by a duly appointed agent acting within the established and confirmed scope of its agency for purposes of national defense, can now give rise to antitrust liability, or can be called into question at all.

---

[40]See *In the Matter of a Reference As to the Validity of the Regulations in Relation to Chemicals, etc.* [1943] Can. Sup. Ct. 1.

The respondents do not claim or suggest any antitrust exemption created by United States statutes, and accordingly cases like *United States v. Borden Co.*, 308 U.S. 188 (1939) and *Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960) are irrelevant. Nor do respondents depend upon mere approval by a regulatory agency, and thus cases like *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945); and *Atchison, Topeka & Santa Fe Ry. Co. v. Aircoach Transport Ass'n*, 253 F.2d 877 (D.C. Cir. 1958) are beside the point. Nor do they claim general immunity from suit, as to themselves or as to Electromet of Canada, so that cases like *Sloan Shipyards Corp. v. United States S. Bd. E.F. Corp.*, 258 U.S. 549 (1922) and *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929), are not in question.[41]

What respondents do assert is that, where the decisive and allegedly injurious act is the act of a foreign government within its own jurisdiction, it cannot be questioned in United States courts. It is not within the ambit of the antitrust laws or any other statute of the United States. *A fortiori*, no action for damages can be based upon it.

The Acts of an Agent of a Foreign Government in Its Own Jurisdiction Are Not Within the Antitrust Laws and Cannot Be Called Into Question.

The act of Electromet of Canada as agent of the Canadian government in refusing to buy is not within the antitrust laws for two major reasons: (1) the Sherman

[41] The cited cases are discussed by petitioners in their brief at pages 112-26.

Act is not intended to apply to governmental acts, and (2) no act of a foreign government within its own jurisdiction can be questioned in our courts.

This Court has very recently reiterated in *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127, 136 (1961) that:

> "* * * where a restraint upon trade or monopolization is the result of valid government action, as opposed to private action, no violation of the Act can be made out."

Similarly in *United States v. Rock Royal Co-op.*, 307 U.S. 533 (1939), *Parker v. Brown*, 317 U.S. 341, 350 (1943) and *Olsen v. Smith*, 195 U.S. 332, 344-45 (1904), this Court concluded that the Sherman Act had never been intended to reach the governmental acts of the states of the Union or the Federal Government, although in each case the same acts, if undertaken by private parties, would have been illegal.

Governments, like corporations, can only act through agents, and, accordingly, the act of a government agent within the scope of his agency is that of the government.

In *Parker v. Brown, supra*, this Court had occasion to consider the scope of the agency granted to the Raisin Proration Committee in California and concluded, despite the very broad grant of authority,[42] that it was the State which adopted and controlled the program (317 U.S. at 352). In *Olsen v. Smith, supra*, this Court held that indi-

[42] "Complete control and plenary direction were conferred upon the program committee . . . ." *Dickey v. Raisin Proration Zone No. 1*, 24 Cal.2d 796, 808; 151 P.2d 505 (1944); Cal. Stats. (1939) Ch. 894, Secs. 18, 19, pp. 2496-98. See also *Brown v. Parker*, 39 F. Supp. 895, 901 (S.D. Cal. 1941) *reversed Parker v. Brown*, 317 U.S. 341 (1943).

viduals who had been granted full power by a state to decide who could engage in the occupation of pilot, did not violate the Sherman Act by their "combination among themselves [to] exclude all others." 195 U.S. at 344-45.

In each of these cases neither the motive of the agent nor the effect of his activities was considered pertinent. In each, the agent or agents exercised governmental powers which in the private sphere would have amounted to an illegal restraint or a monopoly; in each, the private purpose of price fixing or monopolizing was to a greater or lesser degree evident; nevertheless, the courts refused to inquire into such purposes or effects once the act complained of was found to be within the scope of a valid governmental agency.

The ultimate reason for the judicial reluctance to interfere with such agencies is the courts' respect for the governmental choice. By hypothesis, the sovereignty concerned has knowingly chosen an interested agent; it has clothed him with such power as to permit abuse; deliberately it has taken the risk of a possible conflict of interest. The courts refuse to conclude that the agent's acts within the scope of his agency may be deemed a private act, regardless of his motives, when his sovereign principal has characterized his function in advance as a public function. See *United States v. Rock Royal Co-op., supra*, 307 U.S. at 560. If the courts reverse this policy, and do interfere, plainly the potential agent will be reluctant to accept the appointment, and, if he does accept, will be fearful of liability whatever he does and regardless of his motives. *C.f., Barr v. Matteo*, 360 U.S. 564 (1959). Thus the agent will not perform as he should, if he per-

forms at all, and the courts will have injuriously meddled with a governmental process in the name of a statute aimed at private acts alone.

Most particularly should this reasoning apply where, as here, the sovereignty not only grants a broad authority at the inception of an agency, risking the wrongful purpose of the agent, but later specifically reconfirms that authority when the agent's motive is called into question. As a matter of law the sovereign then ratifies the agent's authority as granted and adopts the acts complained of as its own. *The Paquete Habana*, 189 U.S. 453 (1903); *O'Reilly de Camara v. Brooke*, 209 U.S. 45 (1908); *Tiaco v. Forbes*, 228 U.S. 549 (1913); 1 Mechem, *Agency*, Secs. 430, 432, 459 (2d Ed. 1914); Restatement (Second) *Agency*, Sec. 93, Comment a, Sec. 94 (1958). In such case there should be no question that the acts concerned are governmental in character. The sovereign has so declared them, both before and after the fact, and thereby made them an integral part of its own governmental process.

Where the act of a foreign government within its own jurisdiction is concerned, a further and overriding principle dictates the same result. International comity requires that such acts of state be regarded as beyond the jurisdiction of our courts, for "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918); *Ricaud v. American Metal Co.*, 246 U.S. 304, 310 (1918); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *Cf., American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Gladstone v. Ottoman*

Bank [1863] 1 H. & M. 505, 71 Eng. Rep. 221. On the occasions when our courts have by their decrees sought to control foreign acts and policies, immediate and widespread criticism has ensued abroad[43] and our courts have accordingly refrained from so doing in the absence of clear necessity.

Thus in *Vanity Fair Mills v. T. Eaton Co.*, 133 F.Supp. 533 (S.D.N.Y. 1955), *modified*, 234 F.2d 633 (2d Cir. 1955), *cert. denied*, 352 U.S. 871 (1956), the court refused to question the validity of defendant's Canadian trademark registration, regarding this decision as one within Canada's sole jurisdiction. It stated that to do so "might provoke justified resentment" (133 F. Supp. at 529), and the Appellate Court agreed, noting "the tenderness of Canadian authorities concerning what they consider foreign interference with their domestic concerns" (234 F.2d at 647, note 20). The fact that the Canadian registration and defendant's vigorous enforcement of its trademark rights in Canada effectively prevented plaintiff's exports to Canada, was regarded as beside the point.

Especially have the courts declined to intervene when the act complained of intimately concerns the national policy or national security of the foreign country.

---

[43]See, *e.g.*, the Canadian newspaper characterization of the decree in *United States v. Imperial Chemical Industry*, 105 F. Supp. 215 (S.D.N.Y. 1952), as "sheer effrontery" and as an "incredible" example of "American judicial arrogance." *The Globe and Mail*, Toronto, August 20, 1952, page 6, column 1; and see similar comments of the Master of the Rolls in *British Nylon Spinners, Ltd. v. Imperial Chemical Industry, Ltd.* [1953] 1 Ch. 19, 24, 25. See generally Brewster, *Antitrust and American Business Abroad*, pages 45-51 (1958); G. W. Haight, *Antitrust Laws and the Territorial Principle*, 11 Vand. L. Rev., 27, 33-34 (1957); J. T. Haight, *The Restrictive Practices Clause in United States Treaties*, 70 Yale L.J. 240, 251-54 (1960).

The cases in which a foreign government has set up a purchasing or selling agency in the United States for commercial purposes, like *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929), (Pet. Brief, p. 117) are not pertinent here, not only because those corporations operated in this country but also because their purpose was commercial. Here the purpose was governmental. As the court stated in the case of *In re Investigation of World Arrangements*, 13 F.R.D. 280, 290 (D.D.C. 1952):

> "The supplying of oil to insure the maintenance and operation of a naval force—and in this day and age, an air force—is certainly a fundamental government function serving a public purpose. See *Berizzi Bros. v. The Pesaro*, 1926, 271 U.S. 562; 46 S.Ct. 611; 70 L. Ed. 1088."

So it is in this case. The purchase of vanadium in time of war for the Canadian steel mills was, under any standards, a governmental function, and the acts of Canada's agent for such purpose were governmental acts.

From the above authorities, it follows that liability cannot be predicated on the governmental act of Electromet of Canada alone. The significance of the alleged influencing of that governmental act remains to be considered.

The Act of Inducing a Government or Governmental Agency to Exercise Governmental Powers Is Not Cognizable.

The established rule is that if the decisive act complained of is governmental, the means by which private parties may have influenced or induced the decision are immaterial. *Eastern R. Conf. v. Noerr Motors*, 365 U.S.

127 (1961); *United States v. Rock Royal Co-op.*, 307 U.S. 533 (1939); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). So in the *Noerr* case this Court said (365 U.S. at 136):

> "We think it • • • clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."

Similarly, in *Rock Royal* this Court discussed the activities of private parties in proposing, drafting and securing a favorable order from an agency which they dominated and concluded that such activities were beyond the scope of the antitrust laws.

Many years ago Justice Holmes applied the same principle in the foreign field in *American Banana*. Whatever other aspects of the opinion have since been disapproved, the essence of his decision, expressed below, is still sound (213 U.S. at 358-59):

> "The fundamental reason why persuading a sovereign power to do this or that cannot be a tort is not that the sovereign cannot be joined as a defendant or because it must be assumed to be acting lawfully. • • • The fundamental reason is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law."

Similar is the conclusion of the English court, faced with the same problem, in *Gladstone v. Ottoman Bank* [1863] 1 H. & M. 505; 71 Eng. Rep. 221, where the allegation was that the individual defendants "concerted a scheme" for inducing the Sultan of Turkey to revoke plaintiff's exclusive concession and grant it to defendants. The court sustained a demurrer, saying that such efforts could not be considered:

> "It is the act of a foreign sovereign power which overrides everything" (71 Eng. Rep. at 224).

And see *Hewitt v. Speyer*, 250 Fed. 367, 371 (2d Cir. 1918); *Stark v. Howe Sound Co.*, 266 N.Y.S. 368 (Sup. Ct. 1933) *aff'd*, 269 N.Y.S. 936 (App.Div. 1934); *Frazier v. Foreign Bondholders' Protective Council*, 125 N.Y.S. 2d 900, 904 (App.Div. 1953).

In each of the cited cases the influence leading to the governmental act—whether by means of bribery, persuasion, or domination—is merged in the culminating decision of the sovereign. The courts do not examine into the means and motives, nor into the effectiveness, of those who are claimed to have induced the sovereign's decision, because whatever they did is part of the political process which the sovereign permits, and in the end approves, by its own act. The influence may be combatted in the political arena, but not after the fact in the courts, for to do so is necessarily to question the finality of the governmental act itself.

The case is, of course, different if there are in evidence private acts as well. Thus in *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), cited by petitioners in their

brief (pages 118-19)[44] the defendants not only secured a monopoly of a supply of goods in a foreign country but also set up an exclusive sales agency in the United States, which was able to exercise the monopoly here. The facts were, as this Court said in *Sisal*, "radically different" from the facts in *American Banana* (274 U.S. at 275), because in *Banana* the claim was based "upon acts done outside the United States and not unlawful by the law of the place" whereas in *Sisal* the object was a "complete monopoly of both internal and external trade" (274 U.S. at 276).

In the present case nothing of the kind involved in *Sisal* is even alleged, much less proved. If anything at all is shown by the offer of proof, which respondents deny, it is no more than the exercise of some unspecified influence upon a government resulting in a governmental act which itself is claimed to be wrongful. This is precisely the case disposed of by *Noerr*, *Rock Royal* and *American Banana*.

No Action for Damages Can Be Based Upon the Governmental Act in Canada.

There is, however, a further though related reason why petitioners cannot prevail, and that is because they seek *damages*, which necessarily must result from the govern-

---

[44]The petitioners also cite (p. 119) in this connection *United States v. E. P. Oldham Co.*, 152 F. Supp. 818 (N.D. Cal. 1957), but that case involved no governmental act at all.

mental act if there are any damages at all. The present case does not even involve a claim as to any "direct injury as an incidental effect of the . . . campaign to influence governmental action", discussed and rejected in *Noerr*, 365 U.S. at 143. Here there was no attempt to show that the alleged influence, whatever it was, in itself caused damage. Any injuries stemmed solely from Canada's refusal to buy.

But if the injurious act is itself beyond attack, no damages are recoverable. The gist of any treble damage case is the overt act, or acts, which are claimed to cause injury. As said long ago by Mr. Justice Brandeis, in *Keogh v. C. & N.W. Ry. Co.*, 260 U.S. 156, 163 (1922), "injury implies violation of a legal right," so that if, as in *Keogh*, damage stems from a governmental act, no legal injury results. Later, in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945), this Court reaffirmed the *Keogh* reasoning, holding that, although the State of Georgia could *enjoin* a conspiracy to fix flat rates, it could not secure *damages* resulting from the rates ultimately set by the Interstate Commerce Commission, for the reason that the rate itself was made the legal rate by the I.C.C.

The same principle was decisive in *Okefenokee Rural Elec. Mem. Corp. v. Florida P. & L. Co.*, 214 F.2d 413 (5th Cir. 1954), the facts in which were strikingly similar to those in the case at bar. The complaint alleged that the State Road Department refused to issue plaintiff a permit because defendants were conspiring to divide the market among themselves and so persuaded the Depart-

ment. The reasoning of the Court of Appeals for the Fifth Circuit is directly applicable here (214 F.2d at 418):

> "In brief, all of the damages averred in the complaint and all that are shown to be probable have been suffered or will accrue from the denial of the right to use this 'only feasible route.'. . . . The plaintiff had no legal right to use the state highway without a permit from the State Road Department, nor the county roads without permission of the Board of County Commissioners, and those authorities have decided against the plaintiff. So long as their decisions stand the plaintiff has not been legally injured, notwithstanding it may have been irreparably damaged."

The result is that even if, contrary to *Noerr*, the alleged influence could be called into question and condemned in a prosecution by the United States, still petitioners would have no legal basis for a damage recovery. Their claimed injury results solely from the sovereign act of the Government of Canada.

CONCLUSION

The statement of questions presented which petitioners have pressed upon the Court, and upon which the writ of certiorari was in part granted, describes issues where none in fact exist. There is no conflict in the crucial evidence. No legal question is fairly presented by the record.

Petitioners left neither of the courts below a choice as to the result. The judgment should now be affirmed, or the writ dismissed as improvidently granted.

Dated, April 1, 1962.

Respectfully submitted,

HERBERT W. CLARK,

RICHARD J. ARCHER,

GIRVAN PECK,

Attorneys for Respondents Union Carbide Corporation and United States Vanadium Corporation.

MORRISON, FOERSTER, HOLLOWAY,
SHUMAN & CLARK,
Of Counsel.

(Appendices A and B Follow)